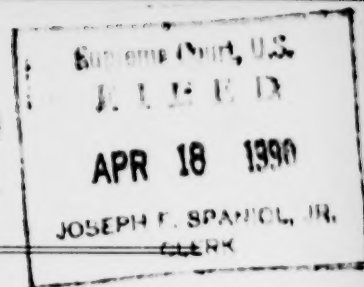


89-1625

No. 89- _____



In The
Supreme Court of the United States
October Term, 1989

CITY OF BURLINGTON, and ROBERT WHALEN,
Operations Manager of Parks &
Recreation Department,

Petitioners,

v.

MARK A. KAPLAN, ESQ., RABBI JAMES S. GLAZIER,
and REVEREND ROBERT E. SENGHAS,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT**

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Date: April 17, 1990

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in requiring municipal government to engage in content based censorship of free religious expression on public forum property; to wit, by mandating that the City of Burlington, Vermont ban placement of a Menorah by a private group in City Hall Park.
2. Whether this Court should provide a clear standard regarding the free exercise of religious activity on public forum property that citizens and municipalities can rely upon.

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Petitioners,

v.

MARK A. KAPLAN, ESQ., RABBI JAMES S. GLAZIER,
and REVEREND ROBERT E. SENGHAS,

*Respondents.*¹

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT**

The Petitioners City of Burlington, Vermont and Robert Whalen respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered on December 12, 1989, request for reargument denied February 9, 1990 in case No. 89-7042. This case involves the right of a private

¹ The only parties to those proceedings are those found in the caption.

group – the Vermont Organization for Jewish Education-Lubavitch – to erect a Menorah in a traditional public forum to commemorate the Hanukkah season.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Second Circuit in *Mark A. Kaplan, et al. v. City of Burlington, et al.*, No. 89-7042 is reported at ___ F.2d ___ (2nd Cir. 1989). A copy of the Opinion appears in the Appendix at pp. 1-25.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on December 12, 1989. A motion for extension of time was granted by Justice Marshall on March 12, 1990 extending the period for filing this petition to May 11, 1990. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Sec. 1254(1) (1988).

CONSTITUTIONAL PROVISION INVOLVED

"AMENDMENT I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

City Hall Park is the New England Town Square of Burlington, Vermont, the state's largest city. The park was laid out by the original proprietors of the City of Burlington on June 26, 1798. Under the terms of the proprietors' action, title to the park is vested with the public; the City of Burlington functions as a trustee for the public.

The park is approximately 2 $\frac{1}{2}$ acres in size located in the center of the downtown business district. It is bounded on the east by a bank, an old fire station now used as office space and the City Hall of the City of Burlington. It is bounded on the north, west and south by city streets. Across from and fronting each of these streets are numerous business establishments including banks, retail businesses, restaurants and apartments.

It was undisputed below that City Hall Park is a traditional public forum. The park contains a number of unattended solitary monuments and symbols including a "Peace Garden" maintained by members of a nonprofit, nonpartisan educational foundation known as "Beyond War" for the purposes of promoting world peace.

It was stipulated below that City Hall Park is frequently used by members of the general public. Within the last five years the City has issued some 300 permits for activities involving the exercise of First Amendment rights to free speech, including permits for political events, commercial exhibits, artistic festivals, and religious gatherings.

It was also stipulated that from 1982 through 1988 permits for City Hall Park were issued to groups engaging in religious activities including a "Jesus Rally", a "Bike for Peace" rally sponsored by the First Unitarians, an anti-abortion march sponsored by religious groups, a festival of gospel singing and music, a festival of Israeli folk dancing and acoustical music sponsored by a Christian congregation, a vigil commemorating the atomic explosion at Nagasaki by a local Catholic group "Pax-Christi", and a food and clothing distribution to the poor by the Maranatha Church of Williston, Vermont. No permit requested for the use of City Hall Park has ever been denied to any applicant.

Commencing in December of 1986 the Vermont Organization for Jewish Education-Lubavitch sought and obtained permission from the City of Burlington to erect a Menorah in City Hall Park to commemorate the Jewish holiday of Hanukkah. The Menorah, 16 ft. high and 12 ft. wide, was erected on December 26, 1986 and maintained through January 6, 1987. It bore a sign stating "Happy Hanukkah" and a disclaimer indicating that it was sponsored by the Lubavitch of Vermont rather than the City. On December 28, 1986 the Menorah was lit in City Hall Park in a ceremony attended by over 100 people, held in accordance with the religious custom of Hanukkah.

In December, 1987, the Lubavitch again sought and received a permit to display the Menorah in City Hall Park from December 15 through December 23, 1987. On December 20, 1987, it was displayed and lit as in the preceding year.

In June, 1988, this suit was brought under 42 U.S.C. 1983 to prevent issuance of further permits for the same purpose. This suit, initiated by the Vermont Chapter of the American Civil Liberties Union on behalf of the Respondents sought declaratory judgment and injunctive relief. In November, 1988, the U.S. District Court for the District of Vermont granted on a stipulated record summary judgment and denied the requested relief. *Kaplan v. City of Burlington*, 700 F.Supp. 1315 (D.C. Vt. 1988). A copy of the opinion appears at App. pp. 28-45.

Respondents then brought an appeal to the U.S. Court of Appeals for the Second Circuit. In a two-to-one decision issued December 12, 1989, the Court of Appeals reversed the order of the District Court. The Court of Appeals held that removal of the Menorah from City Hall Park was mandated by this Court's decision in *County of Allegheny v. A.C.L.U.*, 109 S.Ct. 3086 (1989). The majority reasoned that *Allegheny* teaches that any solitary display of a Menorah on government property *regardless of whether it is public forum property* necessarily conveyed a message of governmental endorsement of religion in violation of the Establishment Clause. The District Court had relied upon *McCreary v. Stone*, 739 F.2d 716 (2nd Cir. 1984), affirmed by an equally divided court *sub nom.*, *Bd. of Trustees of the Village of Scarsdale v. McCreary*, 471 U.S. 83 (1985). The majority opinion of the Court of Appeals stated that a display of the Menorah would be allowed were it not for *Allegheny*, because of the Second Circuit's decision five years ago in *McCreary*, and that the result here was compelled by *Allegheny*.



REASONS FOR GRANTING THE PETITION

Petitioners request that certiorari be granted because the U.S. Court of Appeals for the Second Circuit:

- has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervision. U.S. Sup.Ct. Rule 17.1 (a); and
- has decided an important question of federal law which should be settled by this Court. U.S. Sup.Ct. Rule 17.1(c); and
- has decided an important question of federal law in conflict with the applicable decisions of this Court; U.S. Sup. Ct. Rule 17.1(c).

I. CERTIORARI SHOULD BE GRANTED TO REVERSE THE COURT OF APPEALS' DECISION WHICH REQUIRES MUNICIPAL GOVERNMENT TO ENGAGE IN CONTENT BASED CENSORSHIP OF FREE RELIGIOUS EXPRESSION ON PUBLIC FORUM PROPERTY.

A. The Court of Appeals Totally Misapplied *County of Allegheny* to Public Forum Property.

The Circuit Court of Appeals majority opinion, written by Justice Feinberg and joined by Justice Lumbard with Justice Meskill dissenting, held that because the Lubavitch's Menorah stood alone in Burlington's park – without any accompanying Christmas tree or other secular symbol – its display amounted to “a message of government endorsement of religion” comparable to the creche displayed in the Allegheny County Courthouse that was held to be unconstitutional in *Allegheny County v. A.C.L.U.*, 109 S.Ct. 3086 (1989). The panel majority

analogized Burlington's Menorah to Pittsburgh's creche and it concluded that

[I]f the unattended, solitary display of a creche in *Allegheny* was impermissible in the facts of that case, the unattended solitary display of the Menorah here must be barred. App. p. 16.

This conclusion is erroneous.

There is no finding or any fact in the record of *Allegheny* establishing that the location of the creche at issue was a traditional "public forum" for other forms of speech and for religious activity. Justice Blackmun made it clear in Part IV of his opinion – a section in which he spoke for a Supreme Court majority – that questions concerning a "public forum" were *not* decided in *Allegheny*. See, 109 S.Ct. at 3104, N. 50. Indeed, the Supreme Court Opinion specifically cites the *McCreary* decision and states that "the creche does not raise the kind of 'public forum' issue presented by the creche in *McCreary v. Stone* . . . "

In this case, by contrast, it was stipulated that Burlington City Hall Park has been used – since time immemorial – for public demonstrations and even, as the Court of Appeals acknowledged, for "religious activities."

The importance of the public forum distinction has been underscored by subsequent litigation. In *Chabad of Pittsburgh v. City of Pittsburgh*, 110 S.Ct. 708 (1990), this Court ruled six to three in an unusually expedited proceeding that a preliminary injunction requiring the City of Pittsburgh to permit the display of a Menorah in 1989 on the steps of City Hall should be given effect. The question there was whether the front steps of Pittsburgh's

City Hall are a "public forum" so that the city was required to permit a solitary Menorah display erected by the Chabad at that location.

The decision of the Court of Appeals is directly in contradiction to the result of *Chabad of Pittsburgh* and it deserves the full attention of – and reversal by – this Court.

B. The Public Forum Distinction of *McCreary* Was Not Overruled By *Allegheny*.

The Court of Appeals erred in its assertion that *McCreary v. Stone*, 739 F.2d 716 (2nd Cir. 1984), affirmed by an equally divided court *sub nom.*, *Bd. of Trustees v. Scarsdale*, 471 U.S. 83 (1985), was overturned by *Allegheny*.

In *McCreary*, the Court of Appeals held that a municipality that had opened a public park to other forms of speech was constitutionally *required* to permit the erection of a privately sponsored religious symbol.

McCreary was founded upon this Court's decision in *Widmar v. Vincent*, 454 U.S. 263 (1981). *Widmar* concerned the use of state university facilities by religious student groups. The university sought to bar organizations engaged in "religious worship or religious teaching" from using facilities made available to secular student groups. This Court held that once the university had "created a forum generally open to student groups" it could not "enforce a content based exclusion of religious speech." Such an exclusion, this Court said, "violates the fundamental principle that a state regulation of speech should be content neutral." 454 U.S. at 277.

Widmar provided the foundation for *McCreary v. Stone*, *supra*. The Circuit Court of Appeals held in *McCreary*, *supra*, that a "traditional public forum" maintained by the Village of Scarsdale (739 F.2d at 718-722) could not constitutionally be limited to secular or non-religious activities or displays. The Court specifically found, for reasons that apply equally on this record, that the First Amendment's Establishment Clause could not be invoked as a "compelling state interest" to justify barring a privately financed creche at a public forum. Relying on the standards articulated in *Lynch v. Donnelly*, 465 U.S. 668 (1984), the Court first concluded that the creche display at issue in *McCreary* did not violate the Establishment Clause. The Court then held that the creche could not constitutionally be barred from a public forum on the stated ground that all religious displays would be forbidden.

The majority opinion of the Court of Appeals here brushed aside *McCreary v. Stone* on the contention that it has been preempted by the *Allegheny County* decision. To the contrary. *McCreary* and *Widmar* are unaffected precisely because *Allegheny* did not involve a public forum.

C. The Court of Appeals' Holding Represents a Radical Reversal of Established Constitutional Jurisprudence Regarding Limits On Government Regulation of Speech on Public Forum Property.

It has been horn book law that content-based restrictions on expression in a public forum receive especially careful judicial scrutiny and must fall before the First

Amendment unless they are necessary to serve a compelling governmental interest and are narrowly drawn to achieve that interest. *Boos v. Barry*, 485 U.S. 312 (1988); *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37 (1983); *City of Lakewood v. Plain Dealer Publishing*, 480 U.S. 904 (1988); *Hague v. C.I.O.*, 307 U.S. 496 (1939). If allowed to stand, the majority decision of the Court of Appeals will, under the rubric of the Establishment Clause, *mandate* governmental content based censorship of free religious expression. Under the Court of Appeals rationale, the Lubavitch's symbolic commemoration of Hanukkah by display of a Menorah must be banned *precisely because it is a religious symbol*.

It is well established that content-based censorship of symbolic expression is impermissible. *Tinker v. Des Moines*, 393 U.S. 503 (1969); *Texas v. Johnson*, 109 S.Ct. 2533 (1989).

If left standing, the Court of Appeals' decision results in a curious constitutional jurisprudence. Those who wish to symbolically commemorate Hanukkah on public forum property are not afforded the same constitutional protection as those who wish to burn the American flag.

D. Application of the Court of Appeals' Holding Necessarily Mandates and Results in Governmental Discrimination Against Minority Religious Faiths.

For nearly two centuries the City of Burlington has operated a New England town square traditionally used by private organizations including churches for public meetings, demonstrations and displays. To deny permission to display a Menorah after permission has been

freely granted for a host of other unabashedly religious activities is to engage in unconstitutional discrimination among religious faiths in violation of *Larson v. Valente*, 456 U.S. 228 (1982). Even if the record did not contain evidence of other religious uses of City Hall Park, it would be unconstitutional to bar religious displays if non-religious or secular displays have been liberally permitted. *Widmar v. Vincent*, *supra*.

The Court of Appeals' holding effectively mandates sectarian discrimination. *Lynch* allows the symbolic commemoration of Christmas by putting Christmas symbols into "religious" and "secular" categories; a creche occupies the former, Santa Claus the latter. A ban of supposedly "purely religious" symbols from a public forum park while allowing the public display by government of all the other "secular" symbols of Christmas on both public forum and non-forum public property is hardly "even-handed" from the Jewish perspective. Judaism does not possess the same plethora of symbols associated with Hanukkah that Christian culture possesses with Christmas. By contrast, the Christians possess a veritable cornucopia of symbols associated with Christmas upon which to draw even if the cross and creche are banned.

The Court of Appeals' holding defeats the very essence of *Allegheny* which recognized that while the Menorah is a religious symbol, it is not exclusively so, and that it is primarily a visual symbol for a holiday that, like Christmas, has both religious and secular dimensions.

Simply put it would be a form of discrimination against the Jews to allow Pittsburgh to celebrate Christmas as a cultural tradition while

simultaneously disallowing the City's acknowledgement of Chanukah's contemporaneous cultural tradition. 109 S.Ct at 3112.

Since the Court of Appeals has ruled that the symbol of a minority holiday may not appear *alone* even on public forum property, in practice only religious holidays that are commemorated at Christmas time and in juxtaposition to Christmas symbols can ever be the subject of a display on such property. At any other time of the year there will, presumably, be no "balancing" exhibition of other "secular" or religious holiday symbols.

II. CERTIORARI SHOULD BE GRANTED IN ORDER TO PROVIDE A CLEAR STANDARD REGARDING RELIGIOUS EXPRESSION ON PUBLIC FORUM PROPERTY THAT CITIZENS AND MUNICIPALITIES CAN RELY UPON.

Cities across America are annually confronted with the question whether to permit private groups to display religious symbols on public forum property. The effect of the Court of Appeals' decision has already been to encourage additional litigation in many cities across America. If the Court of Appeals' Opinion remains, the courts can expect to have an endless stream of lawsuits over how close a Menorah display must be to a Christmas tree; whether the public forum property on which a Menorah was located is as identified with government as is Burlington City Hall Park; and whether certain symbols such as the Christmas tree, wreaths, lights, reindeer, candy canes, plastic Santas, etc., are in sufficient proximity to

religious symbols to overcome the "government endorsement" that the majority of the Circuit Court perceived in the "solitary" display of a Menorah.

Indeed, under the Court of Appeals' reasoning, a "solitary" display of a Menorah in any of the many public forum parks here in Washington, D.C. would be veritably impossible given the ubiquitous backdrop of governmental buildings.

Municipalities are now caught in an intolerable cross-fire. The Vermont Organization for Jewish Education-Lubavitch made clear in its *Amicus Brief* to the Court of Appeals that had Burlington rejected its request to display the Menorah, the Lubavitch would itself have sued the City under Section 1983 of the Civil Rights Act. Instead, Burlington granted the permits. Consequently, Burlington found itself the target of just such a lawsuit by plaintiffs represented by the Vermont Chapter of the A.C.L.U.

This dilemma is no better underscored by the conflicting outcomes in the Court of Appeals' decision here issued December 12, 1989 and the outcome of *Chabad of Pittsburgh* seventeen days later.

Following the Court of Appeals' denial of Burlington's Motion for Rehearing *en banc*, the A.C.L.U. indicated in a press release that it would now seek \$20,000 to \$30,000 in legal fees against the City pursuant to 42 U.S.C. 1988. The treasuries of America's municipalities cannot tolerate this damned-if-you-do, damned-if-you-don't state of the law in which the taxpayers inevitably end up serving as the deep pockets for financing of constitutional sparring.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari to the U.S. Court of Appeals for the Second Circuit should be granted.

Respectfully submitted at Burlington, Vermont this
17th day of April, 1990.

City of Burlington, Vermont and
Robert Whalen

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App. 1

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 469 – August Term 1989

Argued: November 14, 1989

Decided: December 12, 1989

Docket No. 89-7042

MARK A. KAPLAN, ESQ., RABBI JAMES S. GLAZIER
and REVEREND ROBERT E. SENGHIAS,

Plaintiffs-Appellants,

–against–

CITY OF BURLINGTON and ROBERT WHALEN,
Operations Manager of Parks and
Recreation Department,

Defendants-Appellees.

Before:

LUMBARD, FEINBERG and MESKILL,

Circuit Judges.

Appeal from judgment of the United States District Court for the District of Vermont, Franklin S. Billings, Jr., J., denying plaintiffs-appellants' request for declaratory and injunctive relief preventing defendants-appellees from issuing permit for display of menorah in City Hall Park in Burlington during Chanukah.

Reversed and remanded. Judge Meskill dissents in a separate opinion.

App. 2

RICHARD T. CASSIDY, Burlington, VT (Hoff, Agel, Curtis, Pacht & Cassidy, P.C.; Steven Green, Vermont Law School, Chelsea, VT; American Civil Liberties Foundation of Vermont, Inc., of Counsel), *for Plaintiffs-Appellants*.

JOHN L. FRANCO, JR., Burlington, VT, Assistant City Attorney, Office of City Attorney and Corporation Counsel, *for Defendants-Appellees*.

NATHAN LEWIN, Washington, DC (Miller, Cassidy, Larroca & Lewin, of Counsel), *for Vermont Organization for Jewish Education - Lubavitch, Amicus Curiae*.

FEINBERG, *Circuit Judge*:

We are called upon once again to consider the constitutionality of the unattended, solitary display on public property of an obviously religious symbol during the Christmas holiday season. This time, however, the symbol on display is not a creche, as it was when this court last wrestled with the issue,¹ but a menorah. Since our decision in that case, the Supreme Court has decided *County of Allegheny v. ACLU*, 109 S. Ct. 3086 (1989). Although there are several separate opinions in *Allegheny*, with various concurrences and dissents, we believe that

¹ *McCreary v. Stone*, 739 F.2d 716 (2d Cir. 1984), *aff'd* by an equally divided Court *sub nom.* *Board of Trustees of Scarsdale v. McCreary*, 471 U.S. 83 (1985).

they indicate that the display of the menorah in this case is unconstitutional. Accordingly, for reasons developed more fully below, we reverse the judgment of the United States District Court for the District of Vermont that allowed the display, and remand for entry of judgment for plaintiffs.

I. Background

Proceedings in the District Court

Plaintiffs Mark A. Kaplan, Rabbi James S. Glazier and Reverend Robert E. Senghas commenced this action in June 1988 in the district court. Plaintiff Kaplan is an attorney, who resides and practices in Burlington, Vermont; Rabbi Glazier is the rabbi for the Temple Sinai reform Jewish Congregation in Burlington; and Reverend Senghas was the minister of the First Unitarian Universalist Church of Burlington. Their complaint named the City of Burlington and Robert Whalen, operations manager of the City's Parks and Recreation Department, as defendants. Plaintiffs sought a declaratory judgment that the City's grant of a permit for the display of a menorah in City Hall Park would violate the Establishment Clause of the First Amendment, reproduced in the margin.² The

² *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.*

U.S. Const. amend. I (emphasis supplied). The Establishment Clause has long been held applicable to the States. See *Wallace v. Jaffree*, 472 U.S. 38, 42 n.10, 48-55 (1985).

permit was to be issued to the Vermont Organization of Jewish Education – Lubavitch (Lubavitch), a Vermont group of orthodox Jews. Plaintiffs also sought preliminary and permanent injunctions against display of the menorah in City Hall Park.

After discovery, the parties entered into a stipulation of facts, pertinent portions of which will be referred to below. Judge Franklin S. Billings, Jr., held an expedited hearing on consent of the parties, after which he issued an oral ruling in defendants' favor. Shortly thereafter, the judge filed a thorough written opinion, dated December 8, 1988, reported at 700 F. Supp. 1315. The judge held that the display of the menorah did not violate the Establishment Clause. This appeal followed.

The Facts of the Dispute

The facts set forth below are taken from the stipulation of the parties, the opinion of the district court and the record and exhibits supplied to us by the parties.

City Hall Park, a plot of land containing 2-1/2 acres, is in a prominent location in Burlington. The City has 18 other parks, but as the name suggests, City Hall Park is in front of City Hall, the seat of Burlington city government. City Hall Park is a traditional public forum, and is frequently used by members of the public for a wide variety of social, artistic, commercial and political events, including fund raising.

There has been a limited history of religious activities in the Park. In the period 1982-1988, the City issued some 13 permits, in addition to those involved in this case, that

suggested religious activity in the Park, e.g., permits to the WGLY Radio Station for Gospel message and music; to Roger Foster on behalf of various church organizations for a Jesus rally, with music and testimonies; and to the Maranatha Church for food and clothing distribution to the poor. However, none of these activities involved the use of the Park for as lengthy a period as that at issue here. Also, none of the permits involved display in the Park of an unattended, solitary religious symbol. Indeed, the Park has apparently never been used for this purpose.

The Vermont Lubavitch group is associated with a larger group of Orthodox Jews known as the Chabad Lubavitch, under the spiritual guidance of a respected rabbi who lives in Brooklyn, New York. The Lubavitch movement is a Hasidic sect that seeks to reawaken interest among Jews in traditional Judaism. The local Lubavitch rabbi in Burlington, Yitzchok Raskin, has acknowledged that the Lubavitch movement advocates the display of menorahs all over the country, and has personally participated in efforts to place menorahs on public property in Miami Beach, Florida, and New York City, New York.

A menorah is a religious symbol of the Jewish faith, and is recognized as such by the general public. The menorah is associated with Chanukah, a religious holiday observed by Jews during an eight-day period which ordinarily falls between the latter part of November and the first part of January of each year. A menorah is a nine-pronged candelabra representing the eight days of Chanukah, with one space for a candle used to light the other eight. "According to Jewish tradition, on the 25th of

Kislev in 164 B.C.E. (before the common era), the Maccabees rededicated the Temple of Jerusalem after recapturing it." *Allegheny*, 109 S. Ct. at 3095. Chanukah commemorates this event. Each Chanukah the menorah is lit to celebrate the miracle of a continuously burning light; as the Court explained in *Allegheny*, "[w]hen the Maccabees rededicated the Temple, they had only enough oil to last for one day. But . . . the oil miraculously lasted for eight days (the length of time it took to obtain additional oil)." 109 S. Ct. at 3095. In a letter requesting permission to erect the menorah, the Vermont Lubavitch group described Chanukah as "the festival of lights," and noted that, "[w]e are celebrating the miracle of a small amount of oil lasting eight days." The plain objective of the display of the menorah in City Hall Park is religious.

In December 1986, the Lubavitch group requested and received permission to erect a menorah in the Park during the celebration of Chanukah. Permission was granted, and the menorah was erected on December 26, 1986 and maintained through January 6, 1987. The menorah, 16 feet high and 12 feet wide, bore a sign, facing only one of the streets forming the Park's boundary. The sign stated "Happy Chanukah" and that the menorah was "Sponsored by: Lubavitch of Vermont." On December 28, 1986, the menorah was lit in City Hall Park in a ceremony attended by over 100 people, held in accordance with the religious customs of Chanukah.

In December 1987, the Vermont Lubavitch group again sought and received a permit, which allowed it to use the "South Lawn Area" of City Hall Park for a "Religious Exhibit - Menorah." The menorah was again

erected on December 15 and maintained through December 23, 1987. On December 20, it was lit as in the preceding year. In June 1988, this suit was brought to prevent further permits for the same purpose.³

When erected in late 1987, the menorah received widespread press attention, including an article and a photograph in the New York Times of Rabbi Raskin lighting the first candle, with City Hall as a backdrop. The article pointed out that the Lubavitch group had been raising the menorah in the park for four years, but had attracted little attention the first two years because the menorah was up for only one day. The article also noted that Burlington's grant of the permit in December 1987 came only one week after a federal magistrate recommended that a cross be removed from the top of a Christmas tree located on the front lawn of a courthouse in nearby Hyde Park, Vermont, because the presence of the cross violated the Establishment Clause.⁴ The menorah

³ In November 1988, the City again granted permission for the display of the menorah, this time in a different part of City Hall Park. Since the Park encompasses less than a city block, we do not regard the change as significant. In any event, this appeal concerns the placement of the menorah during the 1986 and 1987 seasons, which the district court found permissible. Moreover, as a result of the district court's decision, the City is free to return the menorah to its original location.

⁴ See *White v. Village of Hyde Park*, Civ. No. 87-259 (D. Vt. Dec. 10, 1987) (Magistrate's report and recommendation). Subsequently, the parties settled the litigation. As part of the settlement, the Trustees of Hyde Park agreed to no longer place any cross on the Hyde Park Court House lawn. Judge James S. Holden of the district court thereafter approved the stipulation of dismissal, in a written order. *White v. Village of Hyde Park*, Civ. No. 87-259 (D. Vt. Sept. 14, 1988).

became a subject of controversy, the Burlington City Attorney suggested, as a result of the "heightened awareness" of religious symbolism caused by the dispute over the Hyde Park cross.

The three plaintiffs in this action are residents of the area who have been exposed to the menorah in the course of their daily activities. Each believes deeply in the principle of separation of church and state, and claims to have suffered mental anguish when confronted with this alleged violation of that principle. Plaintiff Glazier offered the grounds of the synagogue where he officiates, which is private property, as a site for the display of the menorah. The synagogue is located on a heavily-traveled highway. Plaintiff Senghas made a similar offer regarding the front lawn of the Unitarian Church.

II. Discussion

The Supreme Court decisions dealing with the vexing question of separation of church and state have been the occasion for the spending of much ink in the opinions themselves and in the inevitable commentary they have evoked. However, in view of the Court's recent decision in *Allegheny*, we do not think it necessary or even appropriate to engage in a lengthy discussion of the Court's many decisions in this area. As already indicated, we believe that *Allegheny*, which was decided after the district court in this case issued its opinion, requires us to reverse the district court.

We are aware that appellees would have a much stronger case were it not for *Allegheny*, because of our own court's decision five years ago in *McCreary*. Indeed,

appellees argue that despite *Allegheny*, *McCreary* governs here. In that decision, a panel of this court, relying on the then-recently decided case of *Lynch v. Donnelly*, 465 U.S. 668 (1984), held that the Village of Scarsdale had to allow a group of private citizens to display a crèche, which was to be placed in the center of the business district in a Scarsdale park, a traditional public forum, during the Christmas holiday season. As indicated above, see note 1 *supra*, the panel's decision was affirmed by an equally divided Supreme Court. However, for reasons set forth below, we believe that *McCreary* is not dispositive here.

In *Allegheny*, the Supreme Court held that a crèche in a courthouse in Pittsburgh was not permissible, but a menorah in front of a nearby government office building was. The reasoning that led to this apparently disparate result is instructive. Prior to *Allegheny*, as indicated above, the Court had decided *Lynch v. Donnelly*. In that case, the Court by a 5-4 vote had rejected the argument that the display of a publicly-financed crèche, in a private park in a downtown shopping district in Pawtucket, Rhode Island, was an endorsement of the Christian religion and, therefore, a violation of the Establishment Clause. The crèche was part of a larger display, which included, among other things, such traditional figures and decorations as "a Santa Clause house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree [and] carolers." *Lynch*, 465 U.S. at 671. The Court's majority opinion by Chief Justice Burger relied heavily on the context of the display as part of the Christmas holiday season. *Id.* at 679.

Five years later, *Allegheny* posed the issue of two displays on public property in downtown Pittsburgh –

one of a crèche standing alone and the other of a menorah next to a Christmas tree. The Court divided sharply on the issues thus raised. There were five separate opinions, joined in whole or in part by various members of the Court.

As we understand those opinions, three members of the Court (Justices Brennan, Marshall and Stevens) would not allow, or would create a strong presumption against, the publicly supported display of obviously religious symbols; they, therefore, held unconstitutional the display of both the crèche and the menorah in *Allegheny*. Two members of the Court (Justices Blackmun and O'Connor) would regard the physical context of the display as most significant; in *Allegheny*, the display of the crèche standing alone within a courthouse was improper, but the display of the menorah, outside a government building a block away "next to a Christmas tree and a sign saluting liberty," *id.* at 3112, was not. Four members of the Court (Chief Justice Rehnquist and Justices White, Scalia and Kennedy) would allow display of a religious symbol so long as it did not "represent an effort to proselytize," *id.* at 3139; they believed that display of neither the crèche nor the menorah was such an "effort" and therefore should have been allowed.

This variety of views resulted in shifting majorities. With regard to the holding that the crèche, standing alone, violated the Establishment Clause, one portion of Justice Blackmun's opinion represented the majority of himself and Justices Brennan, Marshall, Stevens and O'Connor. With regard to the holding that allowed the display of the menorah, a majority of Chief Justice Rehnquist, and Justices White, Blackmun, O'Connor, Scalia

and Kennedy agreed on the result reached in another portion of Justice Blackmun's opinion, but not its rationale.

As we see it, *Allegheny* teaches that the display of a menorah on government property in this case conveys a message of government endorsement of religion in violation of the Establishment Clause. We reach that result for the following reasons. As already indicated, three Justices believe that any display of a religious symbol on public property should be barred, or presumptively barred, and two Justices would rest their decision on the physical context of the display. The facts here with regard to the menorah are very much like those in *Allegheny* with regard to the crèche. The menorah, like the crèche in that case, is displayed alone on public property closely associated with a core government function. In *Allegheny*, the crèche was inside the County Courthouse; here, the menorah is right in front of City Hall – the very phrase “is commonly used as a metaphor for government.” *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 128 (7th Cir. 1987). Indeed, the two members of the Court in *Allegheny* who engaged in intensive fact-specific analysis indicated that a menorah standing alone would be improper. See *Allegheny*, 109 S. Ct. at 3113 n.64 (“The display of a menorah alone may well have [the] effect [of endorsing Judaism]. . . .”) (Blackmun, J.); *id.* at 3123 (“A menorah standing alone at city hall might well send such a message [of endorsement] to nonadherents [of Judaism].”) (O'Connor, J).

The menorah, like the crèche, is clearly a religious symbol. All of the Justices in *Allegheny* agreed upon that, although some apparently believed that the menorah is

also a symbol of a religious holiday that over time has acquired a secular component. Although there may be many – Jews and non-Jews – who would disagree with the apparent suggestion that a menorah itself has significant secular import, or that December is the significant holiday season for Judaism, we do not regard that as an important factor here. The parties in this case have stipulated that the menorah is a religious symbol “recognized as such by the general public,” and the menorah here, unlike the menorah in *Allegheny*, was displayed alone so that there was nothing to indicate that the thrust of its message was secular rather than religious.

Appellees argue that there is an implied City disclaimer of sponsorship of the menorah here because it bears the legend that the display is sponsored by the Lubavitch group. However, the crèche in *Allegheny* bore “a plaque stating: ‘This Display Donated by the Holy Name Society,’ ” *id.* at 3094, but that did not alter the result there. *Id.* at 3104.⁵ Moreover, the facts here regarding the religious thrust of the Lubavitch message are, if anything, apparently stronger than in *Allegheny*. In two successive years the menorah candles were lit in a religious ceremony in the Park attended by many people.

⁵ Even if this display had been accompanied by an express disclaimer of City sponsorship and approval, the pervasive message of government endorsement communicated by this context would not be negated. City Hall is closely identified with this particular city park, as its very name and proximity to the seat of municipal authority suggests. In these circumstances, “ ‘a disclaimer of the obvious is of no significant effect.’ ” *American Jewish Congress*, 827 F.2d at 128 (citation omitted).

While there was "some evidence" that this also occurred in *Allegheny*, Justice Blackmun (part of the six-person majority allowing the menorah display) refused to consider that factor because, among other reasons, the court of appeals had not. *Id.* at 3115 n.70. In contrast, we do consider the religious ceremony and regard it as quite significant.

In one respect, however, the facts in this case differ from *Allegheny* and thus arguably suggest a different result. Unlike the County Courthouse, where the crèche in that case was located, see *Allegheny*, *id.* at 3104 n.50, City Hall Park is indisputably a traditional public forum. Appelles argue that the Lubavitch have an absolute constitutional right to engage in symbolic expressive conduct in a public forum such as City Hall Park, limited only by narrow time, place, and manner regulations. If this were so, however, the public forum doctrine would swallow up the Establishment Clause. That this is not so is clear, since the existence of a public forum began, rather than ended, the Supreme Court's analysis in *Widmar v. Vincent*, 454 U.S. 263 (1981), upon which the Lubavitch group relies heavily in its amicus brief. In that case, the Court considered whether a state university that made its facilities generally available for the activities of registered student groups could close the facilities to such groups desiring to use the facilities for religious worship and religious discussion. The Court held that the university, "[h]aving created a forum generally open to student groups," could not now "seek[] to enforce a content-based exclusion of religious speech." *Id.* at 277. We believe that the present case is distinguishable from *Widmar*, since the City, prior to the grant of the permits for the display of the menorah,

had not created a forum in City Hall Park open to the unattended, solitary display of religious symbols. Other than the menorah in question, no permits had been issued for the unattended display of any religious symbol in the Park.

Moreover, even if the City, by granting permits in the past for uses suggesting religious activity, may be deemed to have created a forum open to religious symbols, its grant of a permit in this case would nevertheless violate the Establishment Clause. The existence of a public forum is simply a factor to be taken into account in determining whether the context of the display suggests government endorsement. See *Widmar*, 454 U.S. at 273-75. Here, unlike in *McCreary*, the park involved is not any city park, but rather City Hall Park. This Park is bounded on the east by City Hall, the seat and the official symbol of Burlington city government. During the years in issue, 1986 and 1987, the menorah was located only some 60 feet away from the westerly steps of City Hall; from the general direction of the westerly public street, the menorah appeared superimposed upon City Hall. In light of these facts, "[n]o viewer could reasonably think that it occupies this location without the support and approval of the government." *Allegheny*, 109 S. Ct. at 3104. It is true that the district court reached a different conclusion in this respect, but we believe that it was mistaken as a matter of law. See *Lynch*, 465 U.S. at 693-94 (O'Connor, J., concurring) ("But whether a government activity communicates endorsement of religion is not a question of simple historical fact. . . . [T]he question is . . . in large part a legal question to be answered on the basis of judicial interpretation of social facts.").

Thus, here, unlike in *Widmar*, the City's equal-access policy is incompatible with the Establishment Clause. Central to the Court's conclusion in *Widmar* that an equal-access policy on the part of the university would not violate the Establishment Clause was the factor that "an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices," any more than such a policy confers approval on such eligible groups as the " 'Students for a Democratic Society [or] the Young Socialist Alliance.' " 454 U.S. at 274 (citation omitted). The same cannot be said of the City's permission to display an unattended, solitary religious symbol in City Hall Park, given that Park's close association with the seat of city government, as underscored by the City's need to call a press conference disavowing City responsibility for the menorah. Indeed, the City Attorney acknowledged that "last year we had to say that [the menorah was not sponsored by the City] so often that it became ours in some people's minds." Thus, while previous, apparently noncontroversial, uses of the Park suggesting religious activity could be clearly tied to a speaker, the display of this unattended, solitary, semi-permanent symbol could not; and in the absence of a live speaker to whom responsibility could be attributed, the City was perceived as fulfilling the role of sponsor.

Finally, a prohibition on the display of unattended, solitary religious symbols would not run afoul of the constitutional requirement that "content-based exclusions" be "necessary to serve a compelling state interest" and be "narrowly drawn to achieve that end." *Widmar*, 454 U.S. at 270. Observance of the constitutional mandate

of the Establishment Clause may properly be characterized as a compelling governmental interest, see *id.* at 271, and a prohibition limited to displays of unattended, solitary religious symbols on public property would be narrowly tailored to serve that end, since it would allow the continued use of City Hall Park for all other uses.

In short, we believe that if the unattended, solitary display of a crèche in *Allegheny* was impermissible on the facts of that case, the unattended, solitary display of the menorah here must also be barred.

Although we believe our result is compelled by *Allegheny*, we do not reach it reluctantly. While the motive of the City of Burlington in issuing the permits to the Lubavitch group was doubtless benign, even commendable, that does not dispose of the case before us. What must be considered is the effect of a semi-permanent display in the Park in front of City Hall of a conceded religious symbol. Obviously, few – if any – of the citizens of Burlington will feel threatened by the unattended, solitary display of a religious symbol of a minority faith. But, if that is allowed, it would also seem permissible to display, standing alone, a symbol of the majority faith – a crèche or a cross – and this could well lead members of minority religions or nonbelievers to think that “ ‘adherence to a religion’ ” was relevant to “ ‘standing in the political community.’ ” *Allegheny*, 109 S. Ct. at 3101 (quoting *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring)). Cf. *Friedman v. Board of County Commissioners*, 781 F.2d 777, 779, 781-82 (10th Cir. 1985) (in banc) (official county seal bearing Latin cross and Spanish motto, translated as “With This We Conquer,” prominently displayed on county vehicles and to identify law enforcement officers

would have a "threatening connotation" for non-Christians), cert. denied, 476 U.S. 1169 (1986). Moreover, the display of a minority religious symbol can be disturbing, even if not threatening, to members of the majority faith and to others. It apparently was in this case, since the record suggests that complaints arose from a perceived disparity of treatment. We believe that refusing to allow the unattended, solitary display of such emotion-laden religious symbols as a crèche, a cross or a menorah on public property and encouraging the placement of them instead in places of worship and in the home will, in the long run, tend to diminish "unintended divisiveness." *Allegheny*, 109 S. Ct. at 3132 n.10 (Stevens, J.).

Justice O'Connor pointed out in *Allegheny* that "[w]e live in a pluralistic society. Our citizens come from diverse religious traditions or adhere to no particular religious beliefs at all." 109 S. Ct. at 3119. The Constitution, as it has developed over the years through decisions of the Supreme Court, has allowed Americans of all faiths and of no faith to reach a fragile accommodation in the sensitive area of separation of church and state. Despite the obvious good intentions of the City of Burlington, that accommodation would be hindered, not helped, by grant of the permit in this case.

For the reasons set forth above, we reverse the judgment of the district court and remand for entry of judgment for plaintiffs.

MESKILL, *Circuit Judge*, dissenting:

The issue presented by this appeal is whether a municipality may allow a private group to display a menorah accompanied by a sign identifying the private sponsorship of the menorah in a public park adjacent to City Hall. The resolution of this issue calls for a delicate balancing of individuals' right to religious expression with the proscription against the government's establishment of religion. Because I believe that on the facts of this case, the former prevails over the latter, I respectfully dissent.

The analysis of the menorah display must begin with the premise that the denial of permission to erect the menorah is a content-based restriction on religious expression in a public forum. Such restrictions of expression in a public forum receive especially careful judicial scrutiny. See *Boos v. Barry*, 485 U.S. 312, ___, 108 S.Ct. 1157, 1164 (1988). Content-based restrictions must fall before the First Amendment unless they are necessary to serve a compelling governmental interest and are narrowly drawn to achieve that interest. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *Widmar v. Vincent*, 454 U.S. 263, 270 (1981). It is significant that *County of Allegheny v. American Civil Liberties Union*, 109 S.Ct. 3086 (1989), to which the majority properly looks for guidance, did not raise the issue of individual religious expression in a public forum. *Id.* at 3104 n.50; see *McCreary v. Stone*, 739 F.2d 716 (2d Cir. 1984), *aff'd by an equally divided Court sub nom. Board of Trustees of Scarsdale v. McCreary*, 471 U.S. 83 (1985).

Public parks, like streets and sidewalks, historically “have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 515 (1939); accord *United States v. Grace*, 461 U.S. 171, 177 (1983); *Hudgens v. NLRB*, 424 U.S. 507, 515 (1976). These places “occup[y] a special position in terms of First Amendment protection and will not lose [their] historically recognized character for the reason that [they] abut[] government property that has been dedicated to a use other than as a forum for public expression.” *Grace*, 461 U.S. at 180.

The parties, recognizing the obvious nature of City Hall Park, agree that the park is a traditional public forum. In *Widmar v. Vincent*, the Supreme Court concluded that a state university, having created a public forum for student groups, could not exclude from that forum expression based on its religious content. 454 U.S. at 277. The majority, however, raises a doubt about the import of City Hall Park’s status as a public forum. Instead, it seeks to distinguish *Widmar* from the case now before us by concluding that the City of Burlington (City), by permitting certain prior religious uses of the park, has “not created a forum in City Hall Park open to the unattended, solitary display of religious symbols.”

The majority’s attempted distinction, in my view, misses the main point of *Widmar*. The park’s status as a public forum does not depend upon whether the City has in the past permitted a particular type of speech or form of expressive conduct, as the majority suggests. City Hall Park is an acknowledged traditional public forum, a place where individuals are permitted to speak and express

themselves, subject to reasonable time, place and manner restrictions. See *Perry Educ. Ass'n*, 460 U.S. at 45. The proper question is whether the City may exclude from this place that historically has been held open for free expression a category of speech based on its content. The answer to that question cannot depend solely on whether the expression is attended or unattended. The answer lies in assessing whether the City, by permitting a private group to erect a menorah in a public forum, has conveyed a message of endorsement of religion in violation of the Establishment Clause.

At least as it has been displayed in City Hall Park, the menorah clearly is a religious symbol and the message of the display is a religious one. This, however, is only the beginning of the inquiry. The display of a religious symbol violates the Establishment Clause if the display conveys a message of governmental endorsement of religion. *Allegheny County*, 109 S.Ct. at 3100; see also *Edwards v. Aguillard*, 482 U.S. 578, 593 (1987); *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 389-92 (1985); *Stone v. Graham*, 449 U.S. 39, 41-42 (1980) (per curiam). Careful consideration must therefore be given to the specific factual context of the display. See *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984).

It is of no small significance that the menorah displayed in City Hall Park was owned, erected, maintained, and removed by a private group with no actual contribution or support, financial or otherwise, from the City, except in the form of the issuance of a permit. See *Allegheny County*, 109 S.Ct. at 3097 (privately owned menorah stored, erected, and removed by city, and included in city's holiday display); *Lynch*, 465 U.S. at 671 (city-owned

Christmas display, including crèche, erected on private property). The City thus has not *in fact* sponsored or endorsed the menorah display. The only question is whether a reasonable viewer would *perceive* the City as endorsing the display.

The relatively short time period that the menorah was displayed also deserves note. It is not a permanent fixture in City Hall Park. Instead, it was displayed for only twelve days in 1986, and only nine days in 1987, during the holiday season for Chanukah.

Of paramount significance, however, is the location of the display in a traditional public forum. Neither the crèche nor the menorah in *Allegheny County* was displayed in a public forum. In fact, the crèche was placed inside the County Courthouse in a location where private displays were not ordinarily permitted and "[n]o viewer could reasonably think that it occupie[d the space] without the support and approval of the government." *Allegheny County*, 109 S.Ct. at 3104. By contrast, the menorah in City Hall Park was not overwhelmingly surrounded by the indicia of governmental authority. The only substantial connection between the menorah display and the government was the location of City Hall adjacent to the park.

The majority emphasizes this proximity of the park to and its connection with City Hall, as reflected in the park's name. In particular, the majority stresses that in 1986 and 1987, the menorah was located approximately sixty feet away from the steps of City Hall and that, when viewed from the west side of the park, the menorah was

seen against the backdrop of City Hall.¹ To rest constitutional adjudication on the compass heading of the viewer trivializes the importance of the principles involved. *See id.* at 3144 (Kennedy, J., concurring in judgment in part, dissenting in part) (describing the reliance on a "jurisprudence of minutiae"). Viewed from a different side of the park, the menorah would be superimposed against a bank, a restaurant, or a vacant lot. No reasonable person would suggest that the bank or the restaurant endorses the menorah simply because either one can be seen in the menorah's background.

Permitting religious speech in a public forum in and of itself "does not confer any imprimatur of state approval on religious sects or practices" any more than permitting political speech conveys governmental endorsement of a political group. *Widmar*, 454 U.S. at 274. Indeed, the fact that the display is in a public forum in which a wide variety of other kinds of speech and expression takes place is a factor negating governmental endorsement of the religious message of the display. *Id.* at 274-75. Moreover, I cannot agree that merely because City Hall is located on one side of the park, which is also surrounded by a host of sundry businesses and shops, the park loses its special status as a traditional public forum. *Cf. Grace*, 461 U.S. at 179-80. The record illustrates that the park has been used for a wide variety of expressive purposes,

¹ In 1988, the City required that the menorah be placed in the northeast quadrant of the park, so that when viewed from the west side of the park it would be seen with the Merchants Bank building in the background.

some attended and some unattended. The display of the menorah should be viewed as just part of this diverse group of uses of the park.

The majority also contends that the display of the unattended menorah, unlike other religious uses of the park in which live speakers are present to whom the religious expression can be attributed, results in the perception that the City is the sponsor of the menorah. The menorah display, however, has something that fulfills the role of the live speaker in identifying the sponsor of the display: a sign. The sign, which the district court found was visible for some distance when viewed from the west side of the park, stated that the menorah was sponsored by "Lubavitch of Vermont." We can assume that anyone who is interested in determining the sponsorship of the menorah would read the sign.

Likening the sign here to that accompanying the crèche in *Allegheny County*, the majority maintains that the sign had no effect on the appearance of governmental endorsement of the menorah display. In *Allegheny County*, the crèche display included a plaque stating that the display had been donated by the Holy Name Society. 109 S.Ct. at 3095. Because the crèche, which was located inside the County Courthouse, was so overwhelmingly surrounded by the presence of government, the sign could not dispel the perception of the government's endorsement of the crèche. *Id.* at 3105. Nevertheless, "[w]hile no sign can disclaim an overwhelming message of endorsement, . . . an 'explanatory plaque' may confirm that in particular contexts the government's association with a religious symbol does not represent the government's sponsorship of religious beliefs." *Id.* at 3114-15 (citation

omitted). The sign accompanying the menorah in this case adequately serves to identify the sponsor of the display and contradict any notion of City sponsorship arising out of the location in City Hall Park. The majority nonetheless contends that the message of the menorah display is equally if not more deeply religious in content than that conveyed by the crèche in *Allegheny County*, and that therefore the sponsorship sign should be accorded no significance. The purpose of the sign, however, is not to negate the religious message of the display; rather, it is to negate the message of governmental endorsement of the religious symbol. With the crèche in *Allegheny County*, this was not possible because of the pervasive governmental presence at the crèche's location. That pervasiveness is substantially diminished in a traditional public forum that happens to be adjacent to City Hall. The sponsorship sign, therefore, effectively negates any hint of governmental endorsement that a viewer might "perceive."

I am also unpersuaded that this conclusion should be altered because the City received complaints about the menorah display and felt compelled to respond to those complaints in a press conference. The angry objections of a handful of citizens is of little significance when considering whether the display of a religious symbol *objectively* conveys a message of governmental endorsement. See *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 130 (7th Cir. 1987) (Easterbrook, J., dissenting) ("It would be appalling to conduct litigation under the Establishment Clause as if it were a trademark case, with . . . witnesses testifying they were offended – but would have been less so were the crèche five feet closer to the jumbo

candy cane.""). Furthermore, I would not view the factual context of this case any differently if the City had remained entirely silent in the face of the complaints. It seems almost nonsensical to conclude that the claimed governmental endorsement of the menorah is bolstered by the City's decision to affirm publicly that it did not sponsor or have any other connection with the menorah.

The erection of a privately owned and maintained religious symbol, accompanied by a sign identifying its sponsor, for a relatively short period of time in a traditional public forum does not convey a message of governmental endorsement of religion merely because the forum is located next to City Hall. Rather, the denial of permission to display the menorah would constitute unnecessary hostility toward religion. Permitting the display does not violate the Establishment Clause; denying access to the traditional public forum, in contrast, would treat religious expression differently from other forms of protected expression without any compelling justification for doing so. *See Widmar*, 454 U.S. at 269 & n.6. The First Amendment does not countenance such discrimination on the basis of the content of expression.

For these reasons, I would affirm the judgment of the district court and respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

Filed FEB 9 1990

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the ninth day of February, one thousand nine hundred and ninety.

MARK A. KAPLAN, ESQ., RABBI
JAMES S. GLAZIER and
REVEREND ROBERT E. SENGHAS,

Plaintiffs-Appellants,
-against-

CITY OF BURLINGTON and
ROBERT WHALEN, Operations
Manager of Parks and
Recreation Department,

Defendants-Appellees.

DOCKET
NUMBER:
89-7042

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by defendants-appellees City of Burlington and Robert Whalen, Operations Manager of Parks and Recreation Department,

Upon consideration by the panel that heard the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and a poll of said judges having been taken a majority of the Court has voted not to reconsider the decision in banc. Chief Judge Oakes did not participate in the voting.

/s/ Elaine B. Goldsmith
ELAINE B. GOLDSMITH
Clerk

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

MARK A. KAPLAN, ESQUIRE,	:	
RABBI JAMES S. GLAZIER, and	:	
REVEREND ROBERT E. SENGHAS	:	
	:	Civil Action
v.	:	No. 88-168
CITY OF BURLINGTON, SIDNEY	:	
C. BAKER, Superintendent of	:	
Parks and Recreation	:	
Department, and ROBERT	:	
WHALEN, Operations Manager	:	
of Parks and Recreation	:	
Department	:	

OPINION AND ORDER
(Filed Dec. 9, 1988)

Plaintiffs initiated this action on June 30, 1988, seeking declaratory and injunctive relief preventing defendants from issuing a "Park Special Use Permit" to the Vermont Organization of Jewish Education-Lubavitch ("Lubavitch") for display of a menorah in City Hall Park in Burlington during Hanukkah. Plaintiffs allege that the City's action violates their rights under the establishment clause of the first amendment to the United States Constitution.

Defendants initially moved to dismiss the suit on the grounds that at filing it was both moot and not yet ripe. Hearing on that motion was held on August 1, 1988. On August 29, 1988, this Court issued an Opinion and Order denying defendants' motion to dismiss. The Court noted that, according to plaintiffs allegations, Lubavitch would in all likelihood apply for a permit the following year.

Since defendants' policy required the issuance of a permit, the case fell within the "capable of repetition, yet evading review" exception to mootness, particularly because plaintiffs sought declaratory as well as injunctive relief. See *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 121-22 (1974).¹

Subsequently, defendants answered the complaint by denying plaintiffs' allegations and counterclaiming for a declaratory judgment that the practice of issuing the permit was proper under federal law and required by the Vermont Constitution.

With Hanukkah rapidly approaching, on November 22, 1988, the parties waived the right to trial on the factual issues in the case and submitted a lengthy stipulation of facts along with cross motions for judgment upon the stipulated facts.² The Court held an expedited hearing on the motions on November 30, 1988, at which time three additional exhibits were stipulated for admission.³ The Court accepts all stipulated facts and finds all exhibits as facts. Also, we take judicial notice that Hanukkah, falling every year on the twenty-fifth day of the Jewish month of Kislev, began this year on the evening of December 3.

Mindful that placement of the menorah was imminent pursuant to the newly-issued permit, the Court issued a short oral opinion and order denying plaintiffs' motion for judgment and granting defendants' motion insofar as it sought to dismiss the complaint. We dismissed defendants' counterclaim for a declaratory

judgment, and stated that a more detailed, written opinion would follow. This Opinion seeks to clarify the reasons for the Court's oral ruling of November 30, 1988.

BACKGROUND

City Hall Park is located in Burlington, Vermont's largest city. It is a plot of land approximately two and one-half acres in size, bounded on the east by the Merchant's Bank, the Old Fire Station, and City Hall. The park is bounded on the south by Main Street, on the west by St. Paul Street, and on the north by College Street. Across each of these streets are numerous business establishments, including banks, restaurants, pharmacies, beauty salons and an Arm-Navy surplus store. The Church Street Marketplace, an outdoor pedestrian shopping mall, lies just to the northeast of the Park. City Hall Park is a prominent location in Burlington, around which there is a great deal of vehicular traffic and through which there is a great deal of pedestrian traffic. The parties have stipulated that persons of all "stripes" frequent the Park.

The Park itself contains numerous trees, lampposts, and park benches. Cement public sidewalks border the park on all sides, separating it from the streets and from the Merchants Bank Building, the Old Fire House, and from City Hall. At its center is a circular fountain, and concrete diagonal walkways cross the Park from each corner to the fountain in the center. At the northwest corner of the Park stands a marble monument topped by an American Eagle in memory of Civil War dead. The central fountain is known as the Bicentennial Fountain.

To its north is a world globe mounted on a wooden post intended to promote peace. On the eastern side of the Park, near the northern section of City Hall, is a flagpole and a monument which bears the inscription "Dedicated by the first Vermont Gold Star Mothers in Memory of the Boys who Made the Supreme Sacrifice." The Park contains several public phones.

The parties do not dispute that City Hall Park is a public forum. The Park was set aside for the use of the public by the original proprietors of Burlington on or about June 26, 1798. "Title" is in the public, with the City functioning as trustee over the property. The Park is frequently used by members of the public for special purposes, and Chapter 22, Appendix D, of the Code of Ordinances of the City of Burlington sets forth when permits are required for such uses. Pursuant to § 1(D)(2) and (3) of Appendix D, a Special Use Permit is required whenever a group of twenty or more persons will use the Park, or whenever reservation and exclusive use of the Park for a specific time and date or on a continued scheduled basis is sought.⁴ Within the last five years, approximately 300 permits annually have been issued. In recent years, no permit request has ever been denied. Most permits are for picnics, family reunions, softball, and the like, but the record indicates a substantial number of permits issued for commercial, religious, miscellaneous, and political or quasipolitical activities. The parties agree that the Park is often used for activities involving the exercise of first amendment rights.

In 1986 and 1987, and now again in 1988, Lubavitch has been granted a permit to erect a menorah in City Hall

Park during Hanukkah. During 1986 and 1987, the menorah remained in the Park during the entire eight-day period of Hanukkah each year; it is expected that the menorah will remain in the Park this year for at least an eight-day period. The menorah used each year was constructed in Burlington of wrought iron and measures approximately 12 feet wide by 16 feet high. It is a nine-pronged candelabra used to celebrate the Jewish "festival of lights", which commemorates the recapture of the Temple in Jerusalem from the Syrian Greeks in 165 B.C.E. In 1986, and again in 1987, a public lighting ceremony took place which was attended by over 100 people. It is assumed that such ceremony again took place this year on the first night of Hanukkah.

Affixed to the menorah was a sign which read: "Happy Chanukah" "Sponsored by: Lubavitch of Vermont" "Constructed by - Blackthorne Forge Material - Queen City Steel". The record does not indicate the exact size of the sign, but from the photographs it is evident that the sign was in width at least one-quarter the width of the menorah. Although unlighted, the lettering was in high contrast to the background of the sign, and thus was visible to some distance in a westerly direction from the menorah. The lettering on the sign was not directly visible from other directions.

The parties agree and have stipulated that the City of Burlington in no way sponsored, financed, erected, removed, or explicitly endorsed the menorah. Plaintiffs complain, in essence, that the placement of the menorah in City Hall Park - within the proximity of City Hall⁵ - conveys the appearance of government endorsement and

thus violates the establishment clause of the first amendment. We disagree.

DISCUSSION

Establishment clause jurisprudence often ranks high in confusion, inconsistency, and emotional fervor. It has provoked an enduring and highly spirited debate, as is evidenced by the arguments in this case. The controversy is often fueled by those who advocate extreme positions: either absolute separation between religion and state – often bordering on state enmity to religion – or those who believe that government may aid religion; as long as it aids all creeds equally.

The Supreme Court's teachings in this area also fluctuate. The decisions map out only a wavering, uncertain course of what is permissible government activity. Each case is narrowly tied to its particular facts. Similarly, commentary by legal scholars and the opinions of the Circuit Courts parallel the Supreme Court's deep ideological divisions. The sheer volume of publication on the subject alone discourages judicial reference, particularly on the district court level.

In addition, only recently have the courts begun to address the boundary lines between establishment clause jurisprudence and the free speech provisions of the first amendment. Here, we are forced to strike a delicate balance between the rights of Lubavitch to free expression in a public forum, and the obligation of the City to avoid violating the establishment clause. As former Chief Justice Burger stated in *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971), "Candor compels acknowledgement . . . that we

can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law."

In *Lemon v. Kurtzman*, the Supreme Court conceded that its reference to a "wall of separation" between church and state (a metaphor taken from Thomas Jefferson and used in *Everson v. Board of Education*, 330 U.S. 1, 18 (1948)), had been an unwise choice of metaphors. "[T]he line of separation, far from being a 'wall', is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." 403 U.S. at 614. In *Lemon*, the Court set forth a three-part test used to decide if government conduct violates the establishment clause. The so-called *Lemon* test asks whether government act in question:

- (1) has a secular purpose,
- (2) has a primary effect which neither advances nor inhibits religion; and
- (3) does not foster an excessive government entanglement with religion.

See *Lemon*, 403 U.S. at 612-13.

The *Lemon* approach has been criticized as inadequate, See e.g., *Edwards v. Aguillard*, 107 S. Ct. 2573, 1987 U.S. Lexis 2729, at *90 (1987) (Scalia, J. dissenting); *Wallace v. Jaffree*, 472 U.S. 38, 112 (1985) (Rehnquist, J. dissenting), but has been used by the Court on most occasions, sometimes with the caveat that the test is useful but not singularly determinative, see *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 485 (1986). Although we are mindful that the Court has been hesitant to be constrained by any single test in this area, we think the test retains vitality,

and is helpful as guidance in deciding the issues in this case. See *Bowen v. Kendrick*, 108 S.Ct. 2562, 1988 U.S. Lexis 3027, at *22 (1988) (*Lemon* standard guides "general nature of our inquiry"). Government conduct that violates any one prong of the tripartite test of *Lemon* is unconstitutional. *Stone v. Graham*, 449 U.S. 39 (1980).

Before addressing each prong of the *Lemon* test, we must first determine upon what "government act" we pass judgment. Here, it appears undisputed that the government act consists merely of issuing a permit for the display of a menorah in City Hall Park, which is conceded by both parties to be a public forum. This is not a case of government financial or physical help to religion. Rather, the claim is simply that to some passers-by, it might appear that by allowing the menorah in the Park, the City sponsored it, was associated with it, or endorsed it.

By isolating the government act in question, it is clear that the act does not violate the first prong of the *Lemon* test. The City has a secular purpose, clearly, in allowing expression of all sort – artistic, political, religious, and controversial – in a public forum. Indeed, the rights of the City to limit expressive activity in a public forum are "sharply circumscribed" by the free speech provisions of the first amendment. *Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37, 45 (1983). As such, the City correctly believes it is required to issue permits for expressive activity when requested, and it is undisputed that in the recent past, the City has never denied a permit for first amendment activity in the Park. Nor is there any doubt that City Hall Park is a traditional public forum. Set aside for public use by the original proprietors of Burlington, it

has "immemorially been held in trust for the use of the public and, time out of mind, [has] been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. C.I.O.*, 307 U.S. 496, 515 (1939).

Skipping to the third prong of the *Lemon* test, the parties as much as agree that no excessive entanglement with religion is fostered by the government's act. Certainly, the permit application process itself – which was the only formal contact between the City and Lubavitch – is not excessive entanglement. The establishment clause does not require that there be no contact whatsoever between state and religion. *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 760 (1973). Plaintiffs point out that the Parks Department did provide maintenance services at City Hall Park including landscaping, mowing and snowplowing, which, they claim, "facilitated" the display of the menorah. Plaintiffs have not shown, however, that such minimal maintenance led to excessive entanglement between church and state, nor have they even alleged that the area immediately adjoining the menorah was in fact landscaped, mowed, or plowed during the time the menorah was on display.⁶

Plaintiffs also claim that the placement of the menorah has created political divisiveness in Burlington. Apparently, the menorah and this resulting lawsuit have received widespread press attention in such papers as the New York Times, The Burlington Free Press, and the Valley News of West Lebanon, New Hampshire. A number of city agencies received telephone calls about the menorah, some in support, and some in opposition. Some

unfortunate calls mistakenly suggested that the menorah was permitted only because the Governor of Vermont and/or the Mayor of Burlington are Jewish. On December 18, 1987, Burlington City Attorneys called a news conference to disavow any city sponsorship of the menorah.

We are not persuaded that such divisiveness alone constitutes excessive entanglement or establishes an independent violation of the establishment clause. See *Bowen v. Kenrick*, 108 S.Ct. 2562, 1988 U.S. Lexis 3027, at *48 n.14; *Lynch*, 465 U.S. at 684. In *Lynch v. Donnelly*, the Court held that a litigant could not, by bringing a lawsuit, "create the appearance of divisiveness and then exploit it as evidence of entanglement." 465 U.S. at 484-85. Thus, any controversy engendered by this lawsuit itself must be ignored. In addition, we agree with Justice O'Connor's concurrence in *Lynch* that political divisiveness, although potentially relevant, should not be an independent test of constitutionality. *Lynch*, 465 U.S. at 689 (O'Connor, J. concurring). Measuring the potential for political divisiveness before a government act is taken would be too speculative an endeavor upon which to pin constitutional distinctions. Even after government acts, there is no principled way for a court to measure divisiveness, or to determine how much is too much. Rather, the existence of political divisiveness may provide some evidence that institutional entanglement is excessive, or that government actions are perceived as an endorsement of religion. "But the constitutional inquiry should focus ultimately on the character of the government activity that might cause such divisiveness, not on the divisiveness itself." *Id.* In making this inquiry, we note that the fact that "public debate of religious ideas, like any other, may arouse

emotion, may incite, may foment religious divisiveness and strife does not rob it of constitutional protection." *McDaniel v. Paty*, 435 U.S. 618, 640 (1978) (Brennan, J., concurring).

We turn now to the second prong of the *Lemon* test, whether the city's approval of the permit has a primary effect which neither advances nor inhibits religion.

The second prong of the *Lemon* test is the most sticky of the three prongs, as we view that the real meat of plaintiff's claim is that the placement of the menorah conveys the appearance of government endorsement of a particular religion, and thus has a primary effect of advancing religion. Of course, the parties realize that the government is not intending such result. Rather, plaintiffs claim, even if the impressions of government endorsement were wrong, they were reasonable "given the juxtaposition of the menorah with the most powerful symbol of government authority, City Hall." Plaintiffs' Hearing Memorandum at 20.

We agree that a perceived endorsement of religion, even if erroneous, could result in a violation of the establishment clause. This principle finds support in Justice O'Connor's concurrence in *Lynch*, see 465 U.S. at 690-92, and underlies the holdings in *ACLU v. County of Allegheny*, 842 F.2d 655 (3d Cir.) cert. granted, 109 S.Ct. 53 (1988) and *American Jewish Congress v. City of Chicago*, 827 F.2d 120 (7th Cir. 1987). This erroneous perception of endorsement, however, must be objectively reasonable in light of all the circumstances in the case. Particularly where a public forum is involved, we think plaintiffs

must carry a heavy burden to prove that by merely allowing the speech, the City violates the establishment clause.

Indeed, for the City to enforce a content-based exclusion of religious speech, which plaintiffs urge, the regulation must be necessary to serve a compelling state interest and narrowly drawn to achieve that end. *Perry*, 460 U.S. at 45. Religious speech, like political or artistic expression, is protected by the free speech component of the first amendment. *Widmar v. Vincent*, 454 U.S. 263, 269 (1981). It is true that maintenance of separation between church and state to avoid violation of the establishment clause may be characterized as a compelling government interest. *Id.* at 271. Nonetheless, for this interest to be implicated, plaintiffs must first show that content-based restrictions on speech are necessary and narrowly tailored to avoid a violation of the establishment clause. *Widmar*, 434 U.S. at 270-77; *McCreary v. Stone*, 739 F.2d 716 (2d Cir. 1984), *aff'd by an equally divided Court*, 471 U.S. 83 (1985).

The situation in this case, we find, is unlike the *Allegheny* case, where a creche and menorah were located *inside* the main entrance of a county courthouse; it is also unlike the *American Jewish Congress* case, where a nativity scene was located *within* city hall. Neither case involved the placement of a religious symbol in a traditional public forum, and in those cases, the appearance of endorsement was arguably more objectively reasonable than here. This case, in contrast, is most akin to *McCreary v. Stone*, which we are bound to follow. In *McCreary*, the Second Circuit *required* the Village of Scarsdale to allow the placement of a creche in Boniface Circle, which was found to be a public forum.

Plaintiffs would like to see *McCreary* overturned, but realizing this Court's inability to do so, plaintiffs have attempted to distinguish *McCreary* on two grounds. First, plaintiffs argue that the proximity to Burlington's City Hall sets this case apart from *McCreary*. Second, they argue that a menorah, as distinguished from a creche, is a "singularly religious artifact" that has no place even in a public forum.

Plaintiffs' first argument goes to the objective reasonableness of the mistaken perceptions of city endorsement. Plaintiffs rely on complaints received and the political divisiveness that resulted in Burlington as a result of the menorah's placement. This argument, however, rests on the shaky foundations of the subjective views of some observers of the menorah.⁷ In effect, plaintiffs argue that the subjective, and erroneous, views of some observers – their belief that the City sponsored the menorah – are enough to establish a violation by the City. We reject this argument because we believe these views were not objectively reasonable.⁸ In making this determination, we agree with Justice O'Connor that "whether a government activity communicates endorsement of religion is not a question of simple historical fact. . . . [it is] in large part a legal question to be answered on the basis of judicial interpretation of social facts." *Lynch*, 465 U.S. at 693-94 (concurring opinion); *See also Id.* at 683 (majority opinion) (rejecting assertion that religion is advanced because some observers may perceive the City has endorsed Christianity by displaying the creche).

In light of all the circumstances of the case we cannot conclude that the City's conduct here objectively communicates endorsement of religion. The visual backdrop for

the menorah depends entirely on the viewer's angle of vision; the prominent disclaimer on the menorah was understandable and visible within a reasonable distance of the menorah;⁹ the City called a press conference disclaiming sponsorship of menorah and explaining that the Park was open to everyone. Most importantly, the menorah was placed within a park, long set aside, well known, and in continuous use as a public forum; it was not placed in or on a government building. The fact that the Park is continually used by others for expressive purposes is "an important index of secular effect." *See Widmar*, 454 U.S. at 274. We reject plaintiffs characterization of the Park as "in effect" the lawn of City Hall.

Applying this analysis we cannot say that the government's act of allowing the menorah has a primary affect of advancing religion. This is particularly true in light of *Lynch v. Donnelly*, 465 U.S. at 683, where the Court held that an "indirect, remote, and incidental" benefit to religion would not violate the clause, and *Nyquist*, 413 U.S. at 784 n.39, where the Court stated that the primary effect prong of the *Lemon* test was violated only if the government's action has "the direct and immediate effect of advancing religion".

In this case, we find at most an indirect, remote, or incidental benefit, and thus hold that the City has not violated the second prong of the *Lemon* test.

We also reject plaintiffs' argument that a menorah is a distinctly religious artifact and should thus be banned from public property. Such a rule would require government officials in each case to delve into the history, origin and "religiosity" of an item or display. Such a result, we

think, would more clearly violate the entanglement prong of the *Lemon* test and the free speech provisions of the first amendment. See *Widmar*, 454 U.S. at 269-70 & n.6. It would force government officials to inquire, and to make such decisions; in effect, to act as censors. An unfettered discretion in the municipality would result in a clear violation of the free speech clause. See *City of Lakewood v. Plain Dealer Publishing Co.*, 108 S.Ct. 2138, 1988 U.S. Lexis 2863 (1988). Moreover, we do not think that such distinctions are always easy or clearly made.

CONCLUSION

For the reasons stated, we find that Burlington's conduct did not violate the establishment clause of the United States constitution. We DENY plaintiffs' motion for judgment and GRANT defendants' motion insofar as it seeks to dismiss the complaint. In light of our resolution of the case, we find the declaratory relief sought by defendants unnecessary and DISMISS the counterclaim for a declaratory judgment. Since plaintiffs are not prevailing parties, the claim for attorneys fees and costs pursuant to 42 U.S.C. § 1988 is DENIED.

SO ORDERED.

Dated at Rutland in the district of Vermont this 8th day of December, 1988.

/s/ Franklin S. Billings, Jr.
District Judge

ENDNOTES

¹ For a full discussion of the mootness issue, see our Opinion and Order in this case of August 29, 1988.

² Also on November 22, Lubavitch moved to intervene as a party to the suit. The Court denied the motion as untimely, but granted leave to file briefs as *amicus curiae*.

³ One of these new exhibits, defendants' exhibit A, is the "Park Special Use Permit" issued to Rabbi Yitschok Raskin of Lubavitch for erection of the menorah this year. The permit, approved by Robert Whelan, Operations Manager of the Burlington Parks and Recreation Department, allows the menorah to stand in the northeast section of the Park from December 2 to 12, 1988, and requires a sign disclaiming City sponsorship.

⁴ A Park Special Use Permit is also required whenever an event is open to the public, when the Park is used for commercial or fundraising purposes, for sports events, or when a fee is to be charged. See Burlington Code, Ch. 22 App. D, § 1(D).

⁵ In 1986 and 1987, the menorah was placed in the southeast quadrant of the Park approximately 60 feet west of the west steps of City Hall. Plaintiffs then argued that City Hall stood as a backdrop for the menorah when viewed from certain angles, see plaintiffs' exhibit H-1, *et seq.*, and that this vision conveyed a powerful message of government endorsement. The 1988 permit specifies that the menorah be placed in the northeast section of the Park, thus eliminating, at least from most directions, the possibility that City Hall would be seen as a backdrop. Plaintiffs still contend that placement within City Hall Park – which they see as effectively the "lawn" of City Hall – conveys a message of government endorsement. In light of this allegation, we do not think the movement of the menorah renders the case moot.

⁶ Of course, any direct or indirect benefit conferred on Lubavitch as a result of these exiguous services is *de minimus* for purposes of the second *Lemon* prong. See *Lynch*, 465 U.S. at 684.

⁷ The parties have stipulated that at least some of the calls and letters that the City received concerning the menorah were blatantly antisemitic. *See, e.g.*, defendants exhibit B. In the Court's view, this undermines the weight of these public reactions in determining whether it is objectively reasonable to conclude that the City communicated an endorsement of religion.

⁸ We also question whether these plaintiffs have standing to raise a challenge based on such narrow grounds. Plaintiff Kaplan is an attorney practising in Burlington; plaintiff Glazier is a Rabbi for the Temple Sinai Reformed Jewish Congregation in South Burlington; plaintiff Senghas is a minister of the First Unitarian Universalist Church of Burlington. These plaintiffs are literate and educated individuals who were able to read the menorah's disclaimer, understand the press conference disclaiming city sponsorship, and most importantly, have some concept of the meaning of a public forum. Although we do not question the allegation that plaintiffs "believe strongly in the principle of separation of church and state, and suffer mental anguish when confronted with a graphic violation of that principal" (complaint ¶ 22), we find it hard to believe that *these* plaintiffs actually thought the City was endorsing religion by granting the permit. Rather, plaintiffs in essence complain that other individuals – not them – might get the wrong impression.

Of course, the issue of standing in establishment clause cases is not well-settled, as standing is often unquestioned. *See Bowen v. Kendrick*, 108 S.Ct. 2562, 1988 U.S. Lexis 3027, at *50-53. We need not tackle this thorny issue as we resolve the case on other grounds.

⁹ Plaintiff argues that a certain percentage of the adult population is illiterate, and that children frequent the park who might not be able to read or understand the sign. While this might be true, we do not think it changes the result in the case. First, the disclaimer is but one factor in the totality of the circumstances that contributes to this Court's conclusion that the City did not objectively convey a message of endorsement of religion. Second, we do not believe that government conduct must always be perfectly understood by 100% of observers. Were this the case, it would place an intolerable burden indeed

on government. No matter how careful the City might be, for instance by the imposition of appropriate time, place and manner restrictions on speech, there will always be someone who misunderstands the city's obligation to allow speech in a public forum or who simply dislikes the group or idea being presented.

In The
Supreme Court of the United States
October Term, 1989

FILED
MAY 18 1990
CLERK

CITY OF BURLINGTON, and ROBERT
WHALEN, Operations Manager of
Parks & Recreation Department,

Petitioners,
v.

MARK A. KAPLAN, ESQ.,
RABBI JAMES S. GLAZIER, and
REVEREND ROBERT E. SENGHAS,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of
Appeals For The Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the semi-permanent display of a solitary, unattended religious symbol on public forum property closely associated with the seat of a municipal government violates the establishment clause of the First Amendment?

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No. 89-1625

In The
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CITY OF BURLINGTON, and ROBERT
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MARK A. KAPLAN, ESQ.,
RABBI JAMES S. GLAZIER, and
REVEREND ROBERT E. SENGHAS,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of
Appeals For The Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, Mark A. Kaplan, Esq., Rabbi James S. Glazier, and Reverend Robert E. Senghas, respectfully request that this Court deny the instant petition for writ of certiorari seeking review of the judgment of the United States Court of Appeals for the Second Circuit. *Kaplan v. City of Burlington*, 891 F.2d 1024 (2d Cir. 1989). Petitioners' App. at 1-25. That judgment reversed and remanded the

decision of the United States District Court for the District of Vermont. *Kaplan v. City of Burlington*, 700 F. Supp. 1315 (D. Vt. 1988). Petitioners' App. 28-45. The Second Circuit held that an unattended, solitary display of a religious symbol on public forum property closely associated with a seat of municipal government violates the establishment clause of the First Amendment. *Kaplan*, 891 F.2d at 1028-1030. Petitioners' App. at 11-16.

STATEMENT OF THE CASE

Except as otherwise noted below, the Respondents adopt the statement of the case of the Petitioners.

The parties stipulated that a menorah is a religious symbol of the Jewish faith and is recognized as such by the general public. The menorah in question, which is sixteen feet high and twelve feet wide, was erected and maintained on municipally controlled property some 60 feet from the westerly steps of City Hall; from the general direction of the westerly public street it "appeared superimposed upon City Hall." City Hall is the seat of Burlington City Government. *Id.* at 1025-30. Petitioners' App. at 4-14. It contains, among other things, the office of the Mayor of the City of Burlington, the auditorium in which meetings of the Board of Aldermen are conducted and the offices of many departments of City government, including the City Clerk's and City Attorneys' offices. Stipulation of Facts, No. 31. City Hall is an official symbol of Burlington City government. A drawing of City Hall forms the substance of the seal of the City. Defendants' Exhibit 9. City Hall Park is one of 19 city parks located in

the City of Burlington. No other park is closely associated with the seat of Burlington City Government. *See Kaplan*, 891 F.2d at 1025-26. Petitioners' App. at 4.

Contrary to the City's assertion that the menorah bore a disclaimer indicating that it was sponsored by Lubavitch of Vermont "rather than the City," Petition at 4, the sign associated with the menorah bore only words of endorsement:

HAPPY
CHANUKAH

SPONSORED BY:
LUBAVITCH OF VERMONT

Constructed by - Blackthorne Forge
Material - Queen City Steel

No language appeared on the sign denying the City's sponsorship of the menorah. Plaintiffs' Exhibits H-7 and H-8.

During the years in question the menorah was the centerpiece of a religious lighting ceremony attended by many people. Except for this short religious dedication service, the menorah remained a stark, unattended religious artifact superimposed on City Hall throughout the Chanukah season. Its sign was not illuminated at night. The sign was visible only from a generally westerly direction. *Kaplan*, 891 F.2d 1026, 1029. Petitioners' App. at 6-7, 12-13. Although the sign was visible and the words "Happy Chanukah" were readable from the westerly street, it is fair to infer that from that distance the remaining words on the sign were illegible. Stipulation of Facts, Nos. 73-74.

Also contrary to the Petitioners' assertion, the parties did not stipulate "that from 1982 through 1988 permits for City Hall Park were issued to groups engaging in religious activities." Petition at 4. In fact, the parties stipulated that "[r]eview of all Park Special Use Permits relating to City Hall Park from 1982 through 1988 reveal[s] 13 permits in addition to [the permits at issue here], which suggest the use of the Park involving religious activity." Stipulation of Facts, No. 3 (emphasis added). In fact, in most of the 13 instances, the use of the Park by religious groups was *not* for religious purposes.¹ All of these uses have in common a transient, populated nature. None involved the use of City Hall Park for a lengthy period. Other than the menorah in question, no permits have been issued for the unattended display of any religious symbol in the Park. *Kaplan*, 891 F.2d at 1029. Petitioners' App. at 14.

The display of the menorah caused sectarian dissension in the City of Burlington. A number of City agencies received telephone calls about the menorah, some in support and some in opposition. Some unfortunate calls suggested that because the Governor and the Mayor were

¹ Only four of the permits involve unambiguous religious uses of the park. The other nine permits, while containing some indicia of religious involvement, such as church sponsorship, appear to be of a primarily secular nature. For example, one permit was issued to the Northern Vermont Christian Action Council for an anti-abortion march. A second was issued to the Community Church of Island Pond for teaching Israeli folk dancing. A third was issued to the Unitarian Universalist Society for a "bike for peace rally" involving a joint bike trip by United States and Soviet citizens. Plaintiffs' Exhibits J-1 through J-14-1.

both Jewish, the City might be more inclined to allow a menorah than a creche. Stipulation of Facts, Nos. 78-80. The City Attorney called a news conference to disavow responsibility for the display of the menorah. He acknowledged that "last year we had to say that [the menorah was not sponsored by the City] so often that it became ours in some people's minds." *Kaplan*, 891 F.2d at 1030. Petitioners' App. at 15.

The plain objective of the display of the menorah in City Hall Park is religious. *Id.* at 1026. Petitioners' App. at 6. The entity which sought to place the display in City Hall Park is the Vermont Organization for Jewish Education-Lubavitch, a Vermont corporation organized for the purpose of promoting and disseminating Jewish education. The Vermont Organization for Jewish Education-Lubavitch is associated with a larger group of Orthodox Jews known as the Chabad Lubavitch. The Lubavitch movement is a Hasidic sect that seeks to reawaken interest among Jews in traditional Judaism. The local Lubavitch Rabbi, Yitzchok Raskin, wishes to display the menorah on public property, as distinct from private property. He has acknowledged that "the Lubavitch movement advocate[s] the display of menorahs all over the country." Rabbi Raskin has personally participated in efforts to place menorahs on public property in Miami Beach, Florida and New York City, New York. *Id.* Stipulation of Facts, at 41B (a)-(e).

Other locations are available for the display. Respondent Glazier offered the grounds of the synagogue where he officiates, which is private property, as a site for the display of the menorah. The synagogue is located on a heavily traveled highway. Respondent Senghas made a

similar offer of the front lawn of the Unitarian Church. The church is located in downtown Burlington, approximately three tenths of a mile from City Hall Park. Lubavitch of Vermont is unwilling to display its menorah at either the synagogue or the Church. Stipulation of Facts, Nos. 3A, 136-137.

SUMMARY OF ARGUMENT

The Court of Appeals' decision correctly balanced this Court's establishment clause and public forum decisions. *Compare County of Allegheny v. ACLU*, 109 S. Ct. 3086 (1989) with *Widmar v. Vincent*, 454 U.S. 263 (1981). The public display of an unattended, solitary, semi-permanent religious symbol at the seat of City government created the appearance of City endorsement of religion. The status of the location as a public forum was a factor taken into account in determining that the context suggested endorsement. Observance of the establishment clause is a compelling interest justifying narrow restrictions on religious displays.

Chabad v. City of Pittsburgh, 110 S. Ct. 708 (1989), is not to the contrary.

The decision below is closely tied to the particular context of this display. No sharp conflict of constitutional principles is presented.

Allegheny is a very recent decision; the lower courts have not yet had an opportunity to apply it in more than a few instances. There is no conflict in the circuits. This

Court should allow the issues to mature before reentering the field.

REASONS WHY A WRIT OF CERTIORARI
SHOULD NOT BE GRANTED

I. The Court of Appeals correctly applied the holdings of *Allegheny* and *Widmar* to these facts.

The Court of Appeals carefully harmonized this Court's establishment and public forum standards. It held that the public display of an unattended, solitary, semi-permanent religious symbol *at this particular location* created the appearance of an endorsement of religion by the City of Burlington. Contrary to the Petitioners' suggestion, Petition at 7, the court recognized that *Allegheny* did not turn on the public forum doctrine. *Kaplan v. City of Burlington*, 891 F.2d 1024, 1029 (2d Cir. 1989). Petitioners' App. at 1, 14. The Court did not ignore the public forum issue; instead, it looked to, and followed the standard articulated in *Widmar v. Vincent*, 454 U.S. 263, 270 (1981). *Kaplan*, 891 F.2d at 1029-30. Petitioners' App. at 13-16. It noted, as has this Court, that the identification of a public forum is the beginning not the end of the analysis. *Id.* See *Boos v. Barry*, 108 S. Ct. 1157 (1988). Cf. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (symbolic expression in Lafayette Park and the Mall regulated).

The Court of Appeals correctly applied *Widmar* to the present facts. In *Widmar*, the university had already made its facilities available to a broad range of student groups. *Id.* at 277. Here the City had not "created a forum in City

Hall Park open to the unattended, solitary display of religious symbols." *Kaplan*, 891 F.2d at 1029. Petitioners' App. at 13-14. The court correctly found that observance of the establishment clause is a compelling governmental interest justifying narrow restrictions on certain displays in a public forum. *Id.* at 1030. Petitioners' App. at 15-16; see *Widmar*, 454 U.S. at 271 ("We agree that the interest of the [government] in complying with its constitutional obligations may be characterized as compelling.")² The court also found that a prohibition limited to displays of unattended, solitary religious symbols on public property would be narrowly tailored to serve the City's interest since it would allow the continued use of City Hall Park for all other uses, including transient, populated religious uses. *Kaplan*, 891 F.2d at 1030. Petitioners' App. at 16.

Clearly, the establishment clause, "at the very least, prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.' " *Allegheny*, 109 S. Ct. at 3101 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring)). Thus "the existence of a public forum is simply a factor to be taken into account in determining whether the context of the display

² Justice White suggested in his *Widmar* dissent that religious speech may be different from other varieties of protected speech in certain public forum situations. Otherwise, "the Religion Clauses would be emptied of any independent meaning in circumstances in which religious practice took the form of speech." 454 U.S. at 284 (White, J., dissenting).

suggests governmental endorsement." *Kaplan*, 891 F.2d at 1029. Petitioners' App. at 14.³

The court's finding of endorsement was entirely consistent with this Court's holding in *Allegheny*.⁴ There, a majority of this Court recognized the religious nature of a menorah and stated that "the display of a menorah alone might well have th[e] effect of impermissible endorsement." *Allegheny*, 109 S. Ct. at 3113 n.64.⁵ As the Court of Appeals acknowledged, when a display is located in close proximity to core government buildings such as City Hall – the common "metaphor for government" – a message of governmental endorsement of religion is especially strong. *Kaplan*, 891 F.2d at 1028. Petitioners' App. at 11.⁶

³ Justice Kennedy in his *Allegheny* dissent noted that the location of a religious display on public property should not be controlling on its own. 109 S. Ct. at 3140.

⁴ "The display of religious symbols in public areas of core government buildings runs a special risk of 'mak[ing] religion relevant, in reality or public perception, to status in the political community.'" *Allegheny*, 109 S. Ct. at 3119 (O'Connor, J., concurring).

⁵ Justice Kennedy acknowledged that the permanent display of a religious symbol on a city hall would violate the establishment clause. *Allegheny*, 109 S. Ct. at 3137 (Kennedy, J., dissenting). Justice O'Connor suggested that a semi-permanent display of a religious symbol at the same location would be an endorsement. *Id.* at 3120 (O'Connor, J., concurring).

⁶ Here there is evidence, absent from *Allegheny*, 109 S. Ct. at 3115 n.70, that Lubavitch sought to place its menorah in proximity to City Hall to gain some advantage from close association with government. Stipulation of Facts, Nos. 3A, 41B (c) & (d), 136 & 137; Plaintiffs' Exhibit E. The Petitioners argue

(Continued on following page)

Petitioners' contention that the judgement below is inconsistent with this Court's ruling in *Chabad v. City of Pittsburgh*, 110 S. Ct. 708 (1989), misinterprets the Court's entry order. As Chabad itself argued, the two cases are distinguishable since that case involved a menorah in a "combined holiday display."⁷ That case was founded upon an allegation wholly absent from this one, that the City of Pittsburgh's refusal to display the menorah was in retaliation for Chabad's exercise of its right to petition the courts.⁸ Moreover, no decision on the merits has been issued in that case. All appellate proceedings in *Chabad* reviewed only the district court's grant of a preliminary injunction.⁹ The test before this Court was not whether the display violated the establishment clause, but rather

(Continued from previous page)

that because Judaism is a minority faith, the religious symbols of which are not as secularized as Christian symbols of Christmas, even handed treatment requires the menorah's display. Petition at 11-12. Impliedly, the Petitioners thereby admit adoption of the Lubavitch's religious objectives. On this record the display of the menorah implicates Justice Kennedy's concerns with governmental involvement in proselytizing. *Id.* at 3139 (Kennedy, J., dissenting).

⁷ Plaintiffs' Memorandum of Law in Support of Motion for Temporary Restraining Order and/or Preliminary Injunction, at 14 n.6, *Chabad v. City of Pittsburgh*, No. 89-2432 (W.D. Pa. Dec. 21, 1989) (expressly distinguishing *Kaplan*).

⁸ Plaintiffs' Memorandum of Law in Support of Motion for Temporary Restraining Order and/or Preliminary Injunction, at 2, 4-8, *Chabad v. City of Pittsburgh*, No. 89-2432 (W.D. Pa. Dec. 21, 1989).

⁹ Motion to Vacate "Temporary Stay" of Preliminary Injunction, *Chabad v. City of Pittsburgh*, 110 S. Ct. 708.

as Chabad argued, whether the order of the district court was an abuse of discretion.¹⁰

The Petitioners' assertion that the holding below "represents a radical reversal of established constitutional jurisprudence" regarding governmental regulation of a public forum is simply incorrect. Petition at 9-10. The court followed *Widmar* and *Allegheny* and found that a prohibition limited to displays of unattended, solitary religious symbols on property at a seat of government served a compelling interest of preventing government endorsement of religion and was narrowly tailored to serve that end. *Kaplan*, 891 F.2d at 1030. Petitioners' App. at 15-16.¹¹

Finally, the Petitioners' argument that the court should have reached the opposite conclusion ignores the significant negative consequences which could result. A contrary decision might require placement of numerous

¹⁰ Motion to Vacate "Temporary Stay" of Preliminary Injunction, at 7, *Chabad*, 110 S. Ct. 708, citing *Keyes v. Denver School District*, 396 U.S. 1215, 1216 (1969) (Brennan, Circuit Justice) and *Brown v. Chote*, 411 U.S. 452, 457 (1973).

¹¹ Petitioners' further argument that the court's holding discriminates against minority faiths is also without merit. Minority faiths are not to be favored by government in order to achieve equality. See *Illinois ex rel McCollum v. Board of Education*, 333 U.S. 203, 227 (1948) (Frankfurter, J., concurring) ("Separation is a requirement to abstain from fusing functions of Government and of religious sects, not merely to treat them all equally."). See e.g., *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Wallace v. Jaffree*, 472 U.S. 578 (1987); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 702 (1980).

religious displays on public property.¹² Religious strife could ensue as religious groups compete for access to public property. Governments might seek to close public forums rather than risk identification with religious symbols they find offensive, such as those of satanic cults. The public forum doctrine does not require that government surrender public parks to private interest groups for the purpose of erection of unattended, semi-permanent displays, especially when there are compelling counter-vailing governmental interests at stake, as in this case. See *Clark v. Community for Creative Non-Violence*, 468 U.S. 288.

II. The issues raised by this case are not of sufficient importance to warrant the Court's attention.

As noted in *Allegheny*, cases determining the constitutionality of a public display of religious symbols are usually fact specific to the particular context of the display. *Allegheny*, 109 S. Ct. at 3102-3103.¹³ Here the Court

¹² But see *Allegheny*, 109 S. Ct. at 3112 n.61. "The display of a menorah next to a creche on government property might prove to be invalid."

¹³ Whether a display endorses religion "depends upon the message that the government's practice communicates That inquiry, of necessity, turns upon the context in which the contested object appears The concurrence thus emphasizes that the constitutionality of the creche in that case depended upon its 'particular physical setting,' and further observes: 'Every government practice must be judged in its unique circumstances to determine whether it [endorses] religion.' " *Allegheny*, 109 S. Ct. at 3102. (Blackmun, J., referring to O'Connor, J., concurring in *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984)).

of Appeals applied *Allegheny* to a particular set of facts. Judge Feinberg's majority opinion clearly relied upon facts which demonstrate the singular, unattended nature of the menorah in question, its religious nature and purpose, its appearance "superimposed upon City Hall," the particular sign associated with it, the limited history of religious use of the park, the existence of controversy surrounding the display, the City's ineffective efforts to disclaim endorsement, and even the existence of other locations at which the display could have occurred. *Kaplan*, 891 F.2d at 1025-27, 1029-31. Petitioners' App. at 3-8, 14-16. Quite possibly, the court would have reached a different conclusion with a slightly different set of facts. The factual variations possible in this case are evident in that in November of 1988 the City approved the menorah for a different location in City Hall Park. *Kaplan*, 891 F.2d at 1026, n.3. Petitioners' App. at 7. Last year, after the Court of Appeals' December 12, 1989 decision, the City moved the menorah to still another location in the Park, adjacent to a decorated Christmas tree.

The fact sensitive nature of the Court of Appeals' decision is also demonstrated by the court's treatment of *McCreary v. Stone*, 739 F.2d 716 (2d Cir. 1984), *aff'd by an equally divided court sub nom. Board of Trustees of Scarsdale v. McCreary*, 471 U.S. 83 (1985). Contrary to Petitioners' contention, Petition at 8-9, the court did not assert that *McCreary* was overturned by *Allegheny*. Instead it distinguished *McCreary*, noting that "the park involved is not any city park but rather City Hall Park." *Kaplan*, at 1029. Petitioners' App. at 14.

This Court should hesitate to adjudicate every variant on the *Allegheny - Lynch* paradigm. The application of

this Court's rule to specific facts is a function for the lower courts.

Moreover, the issue Petitioners contend is presented – a sharp conflict between the establishment clause and the public forum doctrine – is a phantom. The court reconciled the application of both principles. It limited its holding to prohibiting the display of an unattended, solitary religious symbol at this location; transient, populated religious uses and nonreligious uses of the park continue unabated. *Kaplan*, 891 F.2d at 1030. Petitioners' App. at 16.¹⁴ There is no inevitable collision here because neither principle is absolute. See *Bowen v. Kendrick*, 108 S. Ct. 2562, 2573 (1988) (incidental aid to religious organizations is permissible); and *Clark*, 468 U.S. 288 (reasonable time, place, and manner regulations that may limit expression are valid). This case does not present an issue that cries out for resolution by this Court.¹⁵

¹⁴ Moreover, the restrictions imposed minimally limit Lubavitch's use of the park. As noted above, *supra* p.4, other attractive locations for display of the menorah are available, and Lubavitch's right to transient, populated use of the park remains unrestricted. Conversely, the City's interest in avoiding claims that it is endorsing or otherwise supporting religion by maintaining a definitive separation of church and state is at least a legitimate end, if not a compelling one. *Widmar*, 454 U.S. at 288-289 (White, J., dissenting).

¹⁵ The Petitioners' argument, Petition at 12, based on liability for Respondents' attorneys' fees is premature. No fee application has yet been filed. Therefore, no attorneys' fees award is a part of the record that Petitioners seek to have reviewed.

III. The issues raised by the Petition should be allowed to mature in the lower courts before review by this Court.

Petitioners also argue that this Court should grant certiorari to provide a clearer standard for the circuits. The previous Court decision concerning the public display of religious symbols, *Lynch v. Donnelly*, was decided more than five years before *Allegheny*. This Court decided *Allegheny* on July 3, 1989, less than eleven months ago, clarifying the previous standard with regard to the public display of religious symbols.¹⁶ Since *Allegheny*, only three circuit courts have had the opportunity to apply the decision.¹⁷ To date, there has been no conflict among the circuits in their interpretation of *Allegheny*.¹⁸

The district courts have just begun to apply *Allegheny*. Respondents' counsels' exhaustive search has revealed only one post *Allegheny* trial court decision

¹⁶ *Allegheny*, 109 S. Ct. at 3101 ("The rationale of the majority opinion in *Lynch* is none too clear").

¹⁷ In addition to this case, *Allegheny* has been applied in *Smith v. County of Albemarle*, 895 F.2d 953 (4th Cir. 1990), and *ACLU v. Wilkinson*, 895 F.2d 1098 (6th Cir. 1990). *Allegheny* was also followed in a fourth case, *Foremaster v. City of St. George*, 882 F.2d 1485 (10th Cir. 1989). (In a case not involving a public forum, the court found a genuine issue of fact as to whether a city seal bearing the likeness of a Mormon temple constituted an endorsement).

¹⁸ *Smith* followed the Second Circuit's *Kaplan* holding, 895 F.2d at 960 n.8, while *Wilkinson* distinguished *Kaplan* on the facts. *Wilkinson*, 895 F.2d at 1102-03.

involving the public forum issue, *Doe v. Small*, 726 F. Supp. 713 (N.D. Ill. 1989), *appeal filed*, (No. 89-3756).¹⁹

Even if there were a need to extend the Court's *Lynch* and *Allegheny* line of decisions, the Court should allow the lower courts more time to interpret and apply its latest decision before reentering the field. As Justice Frankfurter stated some forty years ago, "[i]t may be desirable to have different aspects of an issue further illuminated by the lower courts. Wise adjudication has its own time for ripening." *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 918 (1950) (Frankfurter, J., commenting on a denial of certiorari).

CONCLUSION

The Second Circuit Court of Appeals correctly applied the establishment clause test of *Allegheny* in a public forum context in light of *Widmar*. Its order protects the

¹⁹ *Doe v. Small*, involved a three-month long display in a city park of 16 larger than life-size paintings depicting the life of Jesus Christ. The court found that the public forum issue was not dispositive, holding that even if it were, *Widmar*, 454 U.S. 263, teaches that the city has a compelling interest in complying with the establishment clause. It held, citing *Allegheny*, that the display was unconstitutional. *Doe v. Small*, at 724.

Two other district court cases cite *Allegheny* outside of the public forum context. *Mendelson v. City of St. Cloud*, 719 F. Supp. 1065 (M.D. Fla. 1989) (Latin cross on town water tower held unconstitutional). *ACLU v. County of Delaware*, 726 F. Supp. 184 (S.D. Ohio 1989) (Nativity Scene on county courthouse lawn held unconstitutional).

compelling governmental interest in complying with the establishment clause by narrowly tailored restrictions on the display of unattended, solitary religious symbols at the seat of government, while leaving transient, populated religious speech unrestricted. Its opinion is closely tied to the particular context of this display. No sharp constitutional conflict is presented. Even if an appropriate issue for review were presented by this case, it should await further development in the lower courts.

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Date: May 18, 1990

No. 89-1625

Supreme Court, U.S.
FILED

MAY 18 1990

JOSEPH E. SPANGL, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

CITY OF BURLINGTON, and ROBERT WHALEN,
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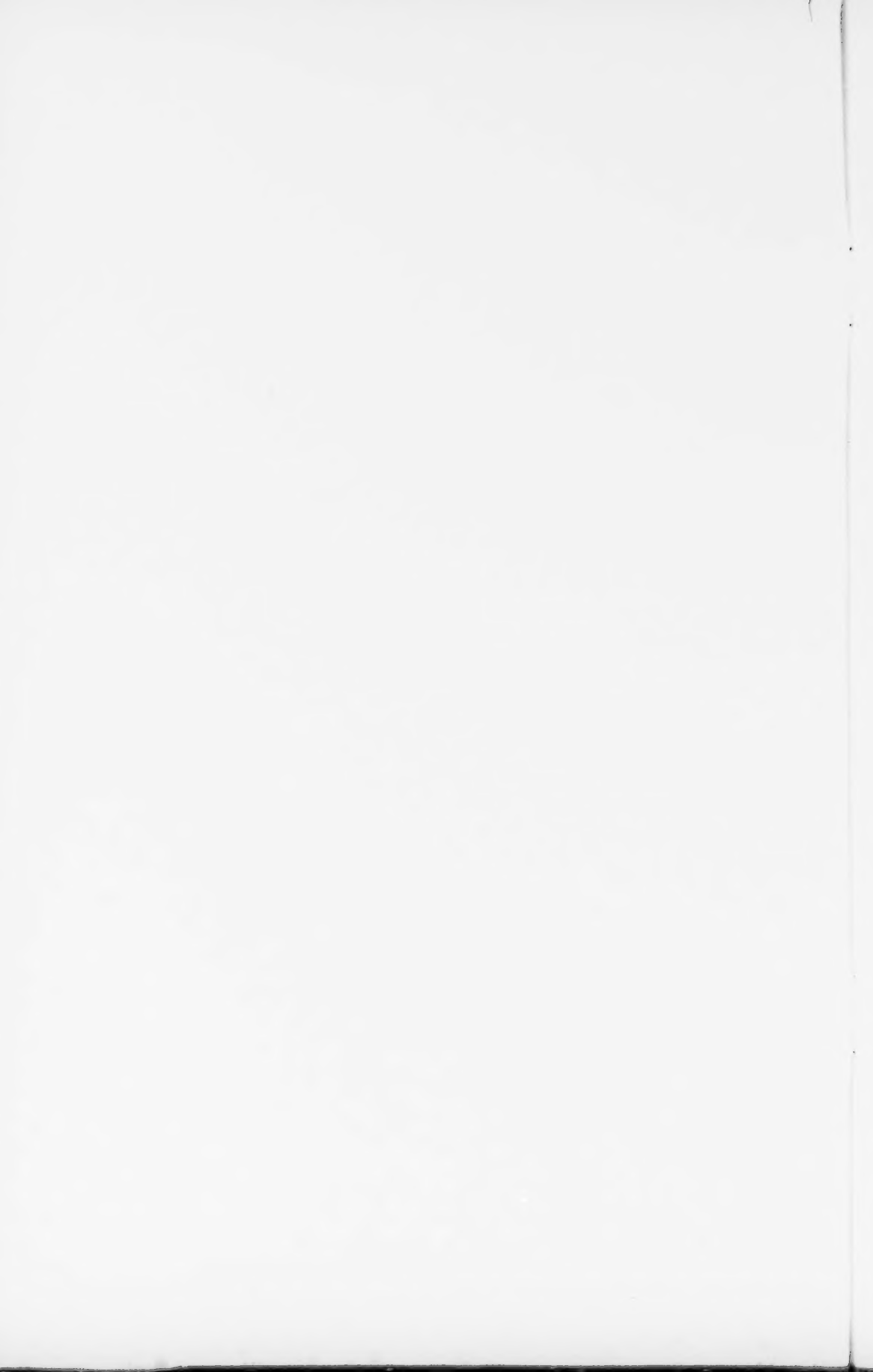
BRIEF OF THE VERMONT ORGANIZATION
FOR JEWISH EDUCATION AS *AMICUS CURIAE*
IN SUPPORT OF THE PETITION

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May 18, 1990



QUESTION PRESENTED

Whether the Establishment Clause prohibits a municipality from voluntarily permitting a private group to display its menorah at a public park that is a "traditional public forum" and that has previously been used, with official permission, for religious activities.

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**BRIEF OF THE VERMONT ORGANIZATION
FOR JEWISH EDUCATION AS *AMICUS CURIAE*
IN SUPPORT OF THE PETITION**

This brief is filed pursuant to Rule 37.2 of the Rules of this Court with the consent of the parties.

INTEREST OF THE *AMICUS*

The *amicus* is the private organization that has sponsored the menorah maintained at Burlington's City Hall Park since 1984. It is undisputed that City Hall Park is a "traditional public forum," and has a long history of unrestricted access for all types of free speech activities, including religious displays and activities and the erection of symbols by private groups. The *amicus* organization

seeks to instill pride among Americans of the Jewish faith, and the privately sponsored display of a menorah at a public forum is an important means of generating such pride and self-respect within a minority religious community.

The City authorities have allowed some of Burlington's Jewish citizens to display a religious symbol at a location that must, by law, be open to the expression of peaceful private opinions. The First Amendment guarantees access to that site for speech having religious content, just as it guarantees access for secular speech. We believe that it amounts to discrimination against religion for a court to overturn the permission granted by the City to maintain a menorah at such a public forum.

REASONS FOR GRANTING THE WRIT

1. *The Case Presents an Issue on Which This Court Was Evenly Divided.*—In *Board of Trustees v. McCreary*, 471 U.S. 83 (1985), this Court divided evenly on the question whether a religious group has a First Amendment right to maintain a religious display at a traditional public forum. In the *McCreary* case, the local authorities refused to permit a privately sponsored creche to be erected in a public park. The court of appeals thereafter ruled that the Constitution did not permit discrimination against speech with religious content, so that a location generally available for private expression must be made available for displays such as a creche. *McCreary v. Stone*, 739 F.2d 716 (2d Cir. 1984). This Court granted certiorari and affirmed, after argument, by an equally divided Court.

The majority of the court below ruled that religious expression could be barred from Burlington's City Hall Park—traditionally a public forum—because the park is “not any city park, but rather City Hall Park” (Pet. App. 14). In other words, access to the most important of Burlington's public forums may constitutionally be denied to those engaged in religious expression. This conclusion

is, we submit, contrary to this Court's decision on *Widmar v. Vincent*, 454 U.S. 263 (1981), and it erroneously decides the issue left unresolved by this Court's even division in *McCreary*.

2. *There Is Now a Conflict Among Circuits on the Central Constitutional Issue.*—The decision of the majority below was explicitly disapproved in the recent decision of the Court of Appeals for the Sixth Circuit in *American Civil Liberties Union v. Wilkinson*, 895 F.2d 1098, 1102 (6th Cir.), *petition for rehearing and for rehearing en banc denied*, 1990 U.S. App. LEXIS 7177 (April 17, 1990). The Sixth Circuit case concerned, *inter alia*, access to the grounds of Kentucky's state capitol, which were being used for live nativity presentations. A majority of the Sixth Circuit panel held that an "equal access" policy—under which religious groups and non-religious groups have the same right to use the public forum—is consistent with the Establishment Clause. 895 F.2d at 1102. Such equal availability, said the majority, sends a message "to Christians and non-Christians alike . . . the Commonwealth offers equal opportunity encouragement for the celebration of whatever winter holiday any responsible citizen, or civil group, or religious group may wish to observe." 895 F.2d at 1104.

Although the Sixth Circuit majority asserted that its case, unlike the subject of the present petition, concerned a symbol that "is itself a public forum" (895 F.2d at 1103), the majority expressly noted that the dissent of Judge Meskill in the present case was "persuasive" (895 F.2d at 1102). It is plain, we submit, that under the reasoning of the majority of the court below, the result reached by the majority of the Sixth Circuit could not stand.

The same issue has also split the Court of Appeals for the Fourth Circuit. A majority of the original panel in *Smith v. County of Albemarle*, 895 F.2d 953 (4th Cir. 1990), agreed with the majority of the court below. *See*

895 F.2d at 960, n.8. The Fourth Circuit case also involved a traditional public forum, and the issue was whether a privately financed creche could be displayed at such a public forum. Although two judges held that it could not, the dissenter concluded that a religious display, accompanied by an appropriate disclaimer, "at a location where other groups have been allowed to convene and/or erect displays" does not amount to an impermissible governmental endorsement of religion. 895 F.2d at 961.

Three of the Fourth Circuit's judges (Russell, Widener and Wilkins, C. JJ.) voted to rehear the *Albemarle County* case *en banc*. Five judges voted to deny rehearing and two recused themselves. 1990 U.S. App. LEXIS 6219 (March 28, 1990). Hence the issue has resulted in a significant division within the Fourth Circuit and in disagreement among the circuits.

3. *The Decision Below Conflicts With This Court's Recent Ruling.*—In *Chabad v. City of Pittsburgh*, 110 S. Ct. 708 (1989), the issue was whether Pittsburgh could constitutionally refuse to permit display of the same menorah that had been held to be constitutionally permissible (when erected with the city's approval) in *County of Allegheny v. American Civil Liberties Union*, 109 S. Ct. 3086 (1989). In a hearing in the district court, the plaintiff had established that the location of the Pittsburgh menorah was a "public forum," and the court had entered a finding to this effect. On this ground, the trial court had ordered the city to permit display of the menorah.

After the court of appeals stayed the district court's order, Justice Brennan overruled the court of appeals. The issue presented to the full Court by Pittsburgh on its motion to overrule Justice Brennan's order was whether the city could be directed to permit this use of a "public forum" for a privately financed religious display. The Court ruled, 6-to-3, that the district court's order should be given effect. 110 S. Ct. 708 (1989).

The ruling of the majority of the court of appeals in this case conflicts with the ruling of the majority of this Court in the *Chabad* case. The symbol is the same in both cases—a large menorah. The proximity of the symbol to the seat of government in the *Chabad* case was even closer than its proximity in this case. Nonetheless, in the *Chabad* case, the display was held to be not only constitutionally permissible but the city was denied authority to bar that display from its public forum.

To be sure, the *Chabad* case concerned a menorah display next to a Christmas tree. But while this circumstance may have been important in the original decision in *Allegheny County*, it was not the dispositive factor in the *Chabad* case. In the latter litigation, the central question concerned the “public forum” and whether a religious group could be denied access to such a forum.

4. *The Issue Is a Recurring One.*—It is important that this Court consider and decide whether menorahs and other displays of religious faiths may be maintained solitarily on public forums. In scores of cities around the country Jewish private groups affiliated with Chabad apply each year to erect and display menorahs at public forums. Their applications are most commonly granted, and the result is a commendable display at many municipal centers of the religious diversity that has made this country strong and has caused it to be a model of religious freedom throughout the world. Indeed, a large “national menorah” is displayed each year, with the permission of the United States Park Service, on the ellipse on Lafayette Park in Washington, D.C.

If the decision below is permitted to stand, municipal authorities will assume that they must forbid religious displays in traditional public forums. The result will be a wholly unjustified suppression of religious expression in public forums otherwise open to all types of speech. Such hostility to religion is not compelled by the First Amendment.

CONCLUSION

The court below has construed the Establishment Clause so broadly as to require a municipality to discriminate against a religious group seeking equal access to a traditional public forum. This holding plainly violates the fundamental First Amendment principle that government may not regulate or censor private speech in a traditional public forum based on the content of the speech. A writ of certiorari should be granted to review the decision of the court of appeals and that decision should be reversed.

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May 18, 1990

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No. 89 -1625

Supreme Court, U.S.
FILED
MAY 17 1990
JOSEPH F. SPANIOLO, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1989

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Operations Manager of Parks & Recreation Department,

Petitioners

v.

MARK A. KAPLAN, ESQ.
RABBI JAMES S. GLAZIER,
and REVEREND MR. ROBERT E. SENGHAS

Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

Brief of the Ottawa Jaycees and The National Legal
Foundation Amici Curiae in Support of the Petition.

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in requiring the city of Burlington to engage in content based censorship of free religious expression on public forum property by mandating that the City ban placement of a Menorah by a private group in City Hall Park.
2. Whether this Court should provide a clear standard regarding the private expression of religious speech on public forum property upon which citizens and municipalities can rely.

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Interest of Amici

1. The Ottawa Jaycees is a private, volunteer group affiliated with the National Jaycees organization. The objective of the Ottawa Jaycees is to promote individual development, community development and management skills. It achieves these objectives by

providing individual members the opportunity to participate in projects and programs that emphasize personal and community development.

During the Christmas holiday seasons from the end of 1980 to the present and 1957 to 1962, 1968, and 1969, the Ottawa Jaycees has erected, maintained and dismantled a set of sixteen paintings depicting scenes from the life of Jesus Christ. These paintings were erected in Washington Park, a public park located in and owned by the City of Ottawa, Illinois. Since 1988, Washington Park has also hosted the Festival of Lights during the Christmas holiday season. This festival includes lights, candles, bows, snowflakes, and a fifteen-foot snowman. The lights are placed in the tree branches and on various memorials in the park. The Salvation Army has also erected its own evergreen Christmas tree in the park.

The City's custom and practice with respect to the park was and is to allow free and equal access to Washington Park for all lawful purposes. Use of the park dates back to at least 1858, when Abraham Lincoln and Stephen Douglas selected Washington Park as the site for one of their senatorial debates. One hundred thirty years later, George Bush selected Washington Park as a forum for a speech and rally during his campaign for the presidency.

Washington Park has also been the site or one of the sites for numerous festivals, including the Friendship

Day Festival and the River Front Festival held annually since 1987. These festivals feature concerts and flea markets. Ottawa's Sesquicentennial Celebration in 1987 was also held in the park. That celebration included flea markets, barbecues, health fares, carnivals, book sales, games and ceremonies in the park. Washington Park has served as the location for public concerts by singers and musicians, including concerts for world peace in 1982 and 1984. In addition, there have been art shows, Vietnam Vets Recognition Ceremonies for POW/MIAs in 1986, 1987, and 1988, a United Way Lunch and a Camp Fire Girls Ceremony.

Washington Park has also served as the site for various religious services, including: an Open Air Meeting by the Congregation of the New Life Ministry, Inc., in 1983; a special church service and religious concert in 1984; the River Cluster United Methodist Churches Worship Service and the Illinois Valley Citizens for Life Prayer Vigil in 1985; Pastor Reed Church Service in 1986; and the Amazing Grace Fellowship meeting and Concert, All Church Concert and Sesquicentennial Interfaith Church Service in 1987.

During the Christmas holiday season, a Santa Claus House has been displayed in Washington Park, every year during the 1960's and 1970's and more recently in alternating years. The lamp posts in the downtown area, including the lamp posts in and surrounding Washington Park, are decorated with holiday symbols.

On August 11, 1988, the original plaintiff, Richard J. Rohrer, filed a complaint against the City of Ottawa and its officials claiming that they violated the First and Fourteenth Amendments by not prohibiting the display. Mr. Rohrer sought an injunction permanently banning the display. The Ottawa Jaycees intervened as of right in the district court.

Rohrer amended his complaint on January 11, 1989. The amended complaint sought a permanent injunction prohibiting defendants from allowing the display without imposing limits on its frequency and duration as allegedly compelled by the Establishment Clause. The complaint was amended again on June 12, 1989, to substitute plaintiffs after Rohrer moved from the State of Illinois; Jane Doe, a resident of the City of Ottawa, became the new plaintiff.

After discovery, all parties filed cross-motions for summary judgment. On December 4, 1989, the district judge issued a Memorandum Opinion and Order, *Doe v. Small*, 726 F.Supp. 713 (N.D. Ill., 1989) granting plaintiff's motion for summary judgment and denying the separate motions of the City of Ottawa and its officials and of the Ottawa Jaycees. The district judge ordered that the City have the Paintings removed from Washington Park by December 8, 1989.¹ The Ottawa Jaycees removed the

1. The plaintiff never requested a temporary injunction prohibiting the display during the pendency of the suit, and on

Paintings on December 8. On December 22, 1989, the Ottawa Jaycees filed its Notice of Appeal with the United States Circuit Court of Appeals for the Seventh Circuit. The City of Ottawa and its officials have not appealed from the judgment of the district court.

2. The National Legal Foundation is a non profit public interest law firm dedicated to the preservation and defense of religious liberty. The Foundation as co-counsel is providing legal representation for the Ottawa Jaycees in their battle against censorship of their religious speech in a public park.

The Foundation has litigated several cases in both federal and state courts to preserve the right of speakers with religious messages to use publicly owned property generally available for speech activities. One such case is *Board of Education of Westside Community Schools v. Mergens*, No. 88-1597, cert. granted 7/3/89, currently before this Court, which involves interpretation and implementation of the Equal Access Act of 1984 which prohibits discrimination against religious clubs on public high school campuses. Another such case is *Deeper Life Christian Fellowship v. Board of Education of the City of New York*, in which the Foundation is representing a Richmond Hill, New York, church that was denied the

November 25, 1989, the Ottawa Jaycees erected the Paintings in Washington Park.

use of a school building generally available on a rental basis to other community groups in the city after school hours. See *Id.*, 852 F.2d. 676 (2d Cir. 1988).

The National Legal Foundation is gravely concerned that opinions such as that of the court below are relegating religious speech and practice to a second-rate status in the public square. The effect of the *Burlington* court's opinion is to make public parks "religious free" zones, contrary to the First Amendment.

3. The purpose of this brief is to draw the Court's attention to the prevalence of discrimination against religious speech and speakers in use of public forums. Your *amici* submit that exclusion of religious speech, speakers, and symbols from public forums, directly violates the free speech rights of religious speakers by excluding them from generally available forums.

Oral permission from the parties consenting to this filing has been obtained. Letters of confirmation will be submitted, upon receipt, to the Clerk pursuant to Rule 37.2.

STATEMENT OF THE CASE

The factual circumstances in the instant case closely resemble those in Ottawa, where *amici* are involved in litigation. Common and contrasting factual elements include the following:

1. Both parks contain unattended solitary monuments and symbols. While Burlington City Hall sits within the park involved in this case, no City of Ottawa buildings are located within Washington park or are visible from the park.
2. In both cases, private groups seek to use public forums for speech with religious content. The displays at issue are privately erected, maintained and removed. No government funds support the displays.
3. City Hall Park in Burlington is a traditional public forum as is Washington Park in Ottawa. Both parks are in prominent locations within their respective cities.
4. Both parks have been used time immemorial by the public for a wide variety

of social, artistic, ceremonial and political events. Each park has also been utilized for religious activities.

5. Both parks are operated on an equal access basis, the City of Burlington requiring a specific permit, and the City of Ottawa requiring no permit, but allowing free access on a first-come, first-served basis. No person has ever been denied permission to use either park.

6. Both displays were accompanied by disclaimer signs noting that the displays were sponsored by private groups.

REASONS FOR GRANTING THE WRIT

The petition raises important issues of first amendment law concerning freedom of speech and religion. At issue is whether the Establishment Clause requires municipal governments to censor religious speech on public forum property because of its religious content. The decision of the court below requires this result.

The majority opinion for the court below misapplied this Court's opinion in *County of Allegheny v. A.C.L.U.*, 106 L.Ed.2d 472 (1989), to exclude the display of the solitary menorah on public forum property. The

creche declared unconstitutional in *County of Allegheny* was not displayed on public forum property.

Nevertheless, that decision specifically anticipated the question of religious displays on public forum property:

The Grand Staircase does not appear to be the kind of location in which all were free to place their displays for weeks at a time, so that the presence of the creche in that location for over six weeks would then not serve to associate the government with the creche.... In this respect, the creche here does not raise the kind of "public forum" issue, cf. *Widmar v. Vincent*, [citations omitted], presented by the creche in *McCreary v. Stone* 739 F.2d 716 (CA2 1984), aff'd by an equally divided Court, sub nom. *Board of Trustees of Scarsdale v. McCreary*, 471 U.S. 83, 85 L.Ed.2d. 63, 105 S.Ct. 1959 (1985) (private creche in public park).

County of Allegheny, 106 L.Ed.2d at 499, n.50.

This case squarely presents the "public forum" issue addressed in footnote 50 where the Court confirmed the vitality of *Widmar* and *McCreary* and recognized that religious displays on public forum property are protected by the First Amendment. The reasoning of the opinion for the court below conflicts with the well-settled principle of *Widmar v. Vincent*, 454 U.S. 263 (1981) that an equal access policy that includes religious speech and speakers in a public forum does not violate the Establishment Clause. In fact, that principle is even more compellingly presented in this case, which involves a "quintessential"

public forum, *Perry Education Assoc. v. Perry Local Education Assoc.*, 460 U.S. 37, 45 (1983); *Hague v. C.I.O.*, 307 U.S. 496, 515 (1939), and not just a designated forum as in *Widmar*, 545 U.S. at 267 n.5.

The opinion below mandates content based censorship of religious expression in a public forum. Such censorship has always been disfavored and subjected to the most exacting scrutiny, requiring both a compelling state interest and a narrowly drawn restriction. *Texas v. Johnson*, 109 S.Ct. 2533 (1989); *Boos v. Barry*, 485 U.S. 312 (1988); *Sable Communications of California v. FCC*, 492 U.S. ____, 106 L.Ed 2d 93 (1989); *Widmar v. Vincent*, 454 U.S. 263 (1981); *McCreary v. Stone*, 739 F.2d. 716 (2nd Cir. 1984), affirmed by an equally divided court *sub.nom*, *Board of Trustees of Scarsdale v. McCreary*, 471 U.S. 83 (1985).

The Establishment Clause of the First Amendment reaches government conduct, not private speech in a public forum. The opinion for the Court below effectively eliminates religious speech and speakers from traditional public fora. Such a result undermines our nation's commitment to "uninhibited, robust and wide open," public debate on the issues of the day, *New York Times v. Sullivan*, 376 U.S. 254, 271, 1964) by removing a whole class of speech - religious speech - from the public. As noted by this Court in *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949):

The right to speak freely and to promote diversity of ideas and programs is...one of the chief distinctions that sets us apart from totalitarian regimes

This includes religious speech and ideas, as Justice Brennan wrote in *McDaniel v. Paty et al.*, 435 US 618, 641 (1978):

The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities.

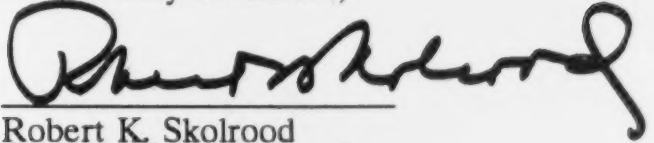
As the petition so ably points out, the Court of Appeal's decision would not afford the same constitutional protection to those who wish to symbolically commemorate Hanukkah as to those who wish to burn the American flag.

This case presents an appropriate opportunity for the Court to clarify its position that religious speech, including symbolic speech, is not second-class speech, but is accorded full constitutional protection. The opinion erroneously singles out religious speech for disfavored treatment based upon its proximity to some edifice or other structure that might suggest government had some connection to the message delivered. No other form of private speech in a public forum is subjected to such treatment.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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IN SUPPORT OF PETITION FOR A WRIT OF
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FILED BY THE CITY OF BURLINGTON
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CERTIORARI TO THE UNITED STATES
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SECOND CIRCUIT FILED BY THE CITY
OF BURLINGTON AND ROBERT WHALEN**

INTEREST OF THE AMICUS CURIAE

This brief Amicus Curiae is filed pursuant to Rule 37 of the Rules of this Court on behalf of the more than 1,500 local governments that are members of the National Institute of Municipal Law Officers (NIMLO).

The members of NIMLO, including the Petitioner City of Burlington, Vermont are state political subdivisions. NIMLO is operated by the chief legal officers of its members, variously called city attorney, county attorney, city or county solicitor, corporation counsel, director of law, or any one of some twenty other titles. The accompanying brief is signed by the municipal attorneys constituting the governing body of NIMLO, both on behalf of NIMLO and on behalf of each of their own municipalities.

The attorneys who operate NIMLO are responsible for advising local governments on the best methods of promoting the health, safety, and welfare of the citizens through the regulation of matters which are of genuine local and municipal concern. These attorneys also represent their governments in litigation resulting from the enforcement of such regulations.

NIMLO finds this case to be of great significance. NIMLO's membership, which consists primarily of local governments, is faced daily with situations in which various individuals and groups request permission to place religious displays on public property. This Court's decision last year in *County of Allegheny v. A.C.L.U.*, 109 S.Ct. 3086 (1989), provided certain guidance on placement of religious displays. However, questions remain, such as the one presented in this case: Whether a lone religious display, unaccompanied by secular symbols or symbols of other religions, is constitutionally permissible on public property traditionally used as a public forum.

In the instant case, the United States Court of Appeals for the Second Circuit found the placement of a menorah in Burlington, Vermont's municipally-owned City Hall Park to be in violation of the Establishment Clause of the First Amendment. NIMLO believes that ruling fails to correctly interpret the decision of this Court in *Allegheny*. In that case, this Court found the display of a creche on the grand staircase of the Allegheny County, Pennsylvania Courthouse to be unconstitu-

tional, but held constitutional the display located just outside the City-County Building of a menorah accompanied by a Christmas tree and a sign saluting liberty. The majority opinion of this Court indicated that the constitutionality of religious displays is largely determined by whether or not the overall setting of the display suggests government endorsement of religion.

Unlike the situation in *Allegheny*, the instant case involves placement of a religious display in a city-owned park which serves as a traditional public forum for the expression of speech protected under the First Amendment. As explained in the Argument, *infra*, p. 7, Justice Blackmun noted in the majority opinion that the creche in *Allegheny* did not present a public forum issue.

A grand stairway inside a courthouse is not a traditional public forum and clearly should not be given the same treatment for First Amendment purposes as a city park which has regularly been used by a variety of groups as a public forum. However, the Second Circuit Court of Appeals has found that the menorah display in Burlington's City Hall Park was violative of the Establishment Clause, notwithstanding the park's status as a traditional public forum.

Because of rulings such as that of the Second Circuit in the instant case, municipalities currently are faced with confusion over the status of the law regarding religious displays on municipal property which has been traditionally used as a public forum. Municipalities need explicit and clear guidelines from this Court on whether or not the constitutionality of religious displays in traditional public fora hinges on the overall setting of the display. The *Allegheny* decision clarified this point only for religious displays in situations involving non-traditional public fora.

Municipalities, including many NIMLO members, are frequently faced with uncertainty as to whether permits for reli-

gious displays should be granted. If such a permit is granted, the municipality may face liability for infringing upon the rights of those who believe the display constitutes an impermissible endorsement of religion. If the permit is denied, the municipality faces potential liability to religious organizations claiming a violation of their right to free speech. Clarification of the law by this Court would save the Nation's municipalities needless waste of taxpayers' dollars such litigation would entail.

Furthermore, NIMLO strongly urges this Court to grant Petitioners' request for certiorari so the Second Circuit's decision may be reversed. Similar rulings in the future can be prevented by holding that the *Allegheny* decision did not eviscerate *McCreary v. Stone*, 739 F.2d 716 (2nd Cir. 1984), *aff'd sub nom.*, *Bd. of Trustees of Scarsdale v. McCreary*, 471 U.S. 83 (1985), in which this Court affirmed the Second Circuit's holding that placement of a privately sponsored religious symbol in a traditional public forum was not a violation of the Establishment Clause.

If decisions such as the ruling of the Second Circuit in the instant case are allowed to stand, municipalities will be forced to deny permits to religious groups wishing to place lone displays in traditional public fora such as city parks due solely to the fact that those seeking to place the displays are religious, rather than secular, in nature. Moreover, although municipalities would frequently be forced to deny religious display permits on First Amendment Establishment Clause grounds, they would often be required to approve permits of secular groups such as the Ku Klux Klan, the Nazi Party, or the Communist Party on First Amendment free speech grounds. The result is non-content neutral regulation based solely on the fact that the permit applicant has a religious purpose. Additionally, municipalities would then face the expense, burden, and political pressures of defending their action from challenge on free speech grounds.

NIMLO, therefore, urges this Court to grant the Petition for a Writ of Certiorari filed by Petitioners City of Burlington and Robert Whalen, and ultimately to reverse the ruling of the Second Circuit Court of Appeals.

Consent to the filing of this brief has been granted by Petitioners and by Respondents. Copies of the letters granting consent have been lodged with this Court.

STATEMENT OF THE CASE

The statement of the case as set forth in Petitioners' Petition for Writ of Certiorari is adopted by Amicus for purposes of this brief *amicus curiae*.

SUMMARY OF THE ARGUMENT

NIMLO urges this Court to grant the Petitioners' Petition for a Writ of Certiorari to allow the Court to establish a clear standard for placement of religious displays on public property that has traditionally served as a public forum. This Court's prior decisions touch on this issue, but do not address it in a way that provide governmental entities, such as municipalities, with clear guidance as to the constitutionality of such displays on public forum property.

NIMLO also urges this Court to reverse the decision of the United States Court of Appeals for the Second Circuit in the case below. The Second Circuit found the placement of the menorah display in Burlington's City Hall Park to be in violation of the Establishment Clause of the First Amendment to the United States Constitution. The Second Circuit's ruling misinterpreted not only existing case law, but also the purposes of the Establishment Clause.

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED TO ALLOW THIS COURT TO ESTABLISH A CLEAR STANDARD FOR PLACEMENT OF RELIGIOUS DISPLAYS ON TRADITIONAL PUBLIC FORUM PROPERTY.

The public forum doctrine has been stated by this Court as follows:

In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed. At one end of the spectrum are streets and parks which have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.... For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.

Perry Educ. Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 45 (1983).

In the landmark Establishment Clause case of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), this Court held that governmental conduct which touches upon religion, if it is to be permissible under the Establishment Clause, (1) must have a secular purpose, (2) must have a principal or primary effect that neither advances nor inhibits religion, and (3) must not foster excessive entanglement with religion by a government. *Lemon* at 612-13. By agreeing to hear the instant case, this Court

could further clarify the principles intended in the Establishment Clause and set forth in *Lemon* by determining specific standards for religious displays placed on traditional public forum property.

The majority opinion of this Court in *Allegheny v. A.C.L.U.*, 109 S. Ct. 3086 (1989), along with the several concurring and dissenting opinions, addressed numerous issues involved in the placement of religious displays on public property. This Court in *Allegheny* followed the *Lemon* analysis, and used it in determining the constitutionality of each religious display. At no point in the *Allegheny* decision, however, is any specific conclusion reached as to the constitutionality of lone religious displays on public property which is considered to be a traditional public forum.

In Part IV of the majority's opinion in *Allegheny*, Justice Blackmun points out in Footnote 50 that "[t]he Grand Staircase does not appear to be the kind of location in which all were free to place their displays for weeks at a time, so that the presence of the creche in that location for over six weeks would then not serve to associate the government with the creche.... [T]he creche here does not raise the kind of 'public forum' issues...presented by the creche in *McCreary v. Stone*, 739 F.2d 716 (2nd Cir. 1984), *aff'd sub nom.* (by an equally divided Court), *Bd. of Trustees of Scarsdale v. McCreary*, 471 U.S. 83 (1985)." 109 S. Ct. at 3104.

In its per curiam decision in *McCreary*, this Court by a 4-4 vote affirmed a Second Circuit ruling which held that the granting of a permit by a municipality to private individuals to construct a creche in a public park during the Christmas season did not violate the Establishment Clause under the *Lemon* test. The lower court stated that a religious symbol such as a creche may be a form of speech for First Amendment purposes. *McCre-*

ary, 739 F.2d at 722.

The Second Circuit clearly upheld the creche display in *McCreary* because the display was in a park which served as a traditional public forum. Other groups, both non-religious and religious, had been permitted to use the park for First Amendment expression. The Second Circuit found that allowing the creche in the same public forum posed no threat to the Establishment Clause. *McCreary*, 739 F.2d at 725. Furthermore, the park was a traditional public forum, and other groups had been permitted to use the park for First Amendment expression. *McCreary*, 739 F.2d at 722.

Subsequently, this Court was confronted with the issue of religious displays on public forum property in *Chabad v. City of Pittsburgh*, 110 S.Ct. 708 (1989) (mem.) (upholding order vacating stay of preliminary injunction). In that case, this Court by a 6 to 3 margin in a memorandum opinion upheld an order by Justice Brennan to reinstate a preliminary injunction which had been issued by the United States District Court but stayed by the United States Court of Appeals for the Third Circuit. The preliminary injunction required the City of Pittsburgh to allow the display of a menorah on the steps of the City-County Building during Hanukkah.

In *Chabad*, unlike *Allegheny*, the religious group (not the municipality itself) wanted to place a menorah on the steps of the City-County Building. The District Court judge ruled that the lowest of the building's steps constituted a public forum and issued the preliminary injunction requiring the city to allow placement of the menorah. The resolution of *Chabad* conflicts with the ruling of the Second Circuit in the instant case. The menorah in both cases was a lone religious symbol, unaccompanied by any other religious or secular symbols. Both menorahs were placed on public property by a religious group against a backdrop of the municipality's main local government building.

However, while this Court agreed to an injunction mandating the placement of the menorah in the *Chabad* case, the Second Circuit in the instant case reached the opposite conclusion and found the Burlington menorah in violation of the First Amendment. This Court should further the public forum principles set forth in *McCreary* and state clear, comprehensive standards governing the placement of lone religious symbols on public fora. Such need unquestionably exists to prevent future inconsistencies and give municipalities straightforward guidelines in granting permits for religious displays on traditional public forum property.

II. CERTIORARI SHOULD BE GRANTED TO REVERSE THE SECOND CIRCUIT COURT OF APPEALS' DECISION FINDING THE PLACEMENT OF THE MENORAH IN BURLINGTON'S CITY HALL PARK UNCONSTITUTIONAL.

NIMLO urges this Court to reverse the decision of the Second Circuit. Ironically, in the instant case, it is the Second Circuit -- the same court that wrote the *McCreary* opinion -- which holds the menorah display in City Hall Park in violation of the Establishment Clause and finds its own *McCreary* holding not dispositive. The Second Circuit appears to distinguish the instant case primarily because of the proximity of the display to the City Hall building. See further discussion of this issue, *infra*, p. 11.

In finding the menorah display in City Hall Park unconstitutional, the Second Circuit has apparently taken the intention of the Establishment Clause to the extreme. The original purpose of the Establishment Clause was to prevent the new national government from setting up an established church financed and controlled by the government, such as the Church of England. See *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43 (1815). The Clause was designed to protect the religious liberties of those

individuals who did not belong to the majority church denomination, as well as non-believers. The Founding Fathers successfully fought this problem by building a wall of separation between church and state in the new nation through the drafting and subsequent ratification of the First Amendment and its Establishment and Free Exercise Clauses.

However, in *Lynch v. Donnelly*, 465 U.S. 668 (1984), this Court held that the Constitution does not require complete separation of church and state. Furthermore, the Court stated, the Establishment Clause mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. The Court explained that anything less than accommodation of all religions would require "callous indifference," which was not intended by the Establishment Clause. *Lynch* at 674.

The Second Circuit's ruling in this case is a prime example of a court taking separation of church and state to the point of hostility towards religion. The Second Circuit states, "Appellees {City of Burlington and Robert Whalen} argue that the Lubavitch have an absolute constitutional right to engage in symbolic expressive conduct in a public forum such as City Hall Park, limited only by narrow time, place, and manner regulations. If this were so, however, the public forum doctrine would swallow up the Establishment Clause." See *City of Burlington, et al. v. Mark A. Kaplan, et al.*, 700 F.Supp. 1315 (D. Vt. 1988), *rev'd*, 891 F.2d 1024 (2nd Cir. 1989), *petition for cert. filed*, Apr. 17, 1990, No. 89-1625, at 891 F.2d 1029.

NIMLO posits that the Second Circuit has carried the purposes of the Establishment Clause to the extreme. Contrary to the public forum doctrine swallowing the Establishment Clause, the Second Circuit's ruling allows the Establishment Clause to swallow the right to free speech. This Court needs to clarify the jurisprudence on religious displays in a traditional public forum setting to prevent lower courts' misinterpretation of the relationship between the various clauses of the First Amend-

ment. The City of Burlington granted permits from 1982-1988 to allow use of City Hall Park for a wide variety of free speech activities, including political, commercial, artistic, and religious. See *City of Burlington* at Petition for a Writ of Certiorari, p. 3. Undoubtedly, the Founding Fathers did not intend for certain free speech rights to be abolished solely due to the fact that the speech involves a religious context.

One greatly troublesome portion of the Second Circuit's opinion, the section in which that court attempts to distinguish *McCreary* from the instant case, involves its interpretation of the connection between the physical placement of the menorah and its proximity to City Hall. The Second Circuit states, "here, unlike *McCreary*, the park involved is not any city park, but rather City Hall Park..." and goes on to explain that the location of the menorah display in this case led viewers to believe that the display was placed by the City of Burlington, which was therefore endorsing religion. *City of Burlington*, 891 F.2d at 1029. This reasoning is extremely distorted.

In *Allegheny*, Justice Blackmun stated in the majority opinion that since the creche in that case sat on the Grand Staircase, the "main" and "most beautiful part of the county government building, "{n}o viewer could reasonable think that it occupies this location without the support and approval of the government." *Allegheny*, 109 S.Ct. at 3104. The Second Circuit in the instant case cited this passage and applied the same language to the Burlington situation although the menorah was placed in a public park located approximately 60 feet away from the steps of Burlington City Hall. The Second Circuit claimed the undoubtable impression of government endorsement of religion resulted not only from the proximity of the display to City Hall, but also because "from the general direction of the westerly public street, the menorah appeared superimposed upon City Hall." *City of Burlington*, 891 F.2d at 1029 - 1030.

This interpretation of the facts by the Second Circuit failed to take into account the fact that the menorah in City Hall Park bore a disclaimer explaining that the display was sponsored by the Lubavitch of Vermont, not the City of Burlington. The Second Circuit explained that the disclaimer did not alter the message of religious endorsement because the menorah candles were lit in well-attended religious ceremonies, and because the creche in *Allegheny* also had a disclaimer sign. *City of Burlington*, 891 F.2d at 1029. However, the Allegheny County Courthouse creche, unlike the menorah in the instant case, was not located on property which is a traditional public forum.

The creche in *McCreary* was accompanied by a sign disclaiming municipal ownership of the display. The Second Circuit held in that case that a sufficiently prominent disclaimer sign indicating that the municipality did not sponsor the creche displayed in its park could prevent a finding that the creche violated the Establishment Clause. *McCreary*, 739 F.2d at 728.

This Court in *Allegheny* furthered the disclaimer idea, stating that while no sign can disclaim an overwhelming message of endorsement, an explanatory plaque may confirm that in particular contexts the government's association with a religious symbol does not represent the government's sponsorship of religious beliefs. *Allegheny*, 109 S.Ct. at 3115. The menorah in the instant case also had a disclaimer sign and the city even held press conferences disclaiming any endorsement of the display by the City of Burlington.

The Second Circuit's ruling in the instant case reflects unwarranted hostility toward religion which is adverse to the purposes of the Establishment Clause. Furthermore, that court has misinterpreted the *McCreary* and *Allegheny* decisions in its holdings on the proximity of the menorah display to the City Hall building. Therefore, this Court should reverse the decision of the Second Circuit, and agree to rule on the merits of this case.

CONCLUSION

For the foregoing reasons, Amicus respectfully urges that this Court grant Petitioners' Petition for a Writ of Certiorari and reverse the decision of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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May 18, 1990

